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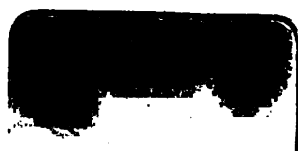
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J. S. Y.
J. A. Y.
M. Y.
V. Y.



J.

J A

11

v.

REPORTS OF CASES

ADJUDGED IN THE

HIGH COURT OF CHANCERY,

BEFORE THE

RIGHT HON. SIR JAMES WIGRAM, KNT.,
VICE-CHANCELLOR.



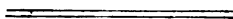
By THOMAS HARE,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.



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1845, 1846, 1847—8, 9 & 10 VICTORIÆ.



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ERRATUM.

Page 195, marginal note, line 5 from bottom, for "Plaintiff" read "Defendant."

REPORTS OF CASES

ADJUDGED IN THE

High Court of Chancery,

BEFORE

THE RIGHT HON. SIR JAMES WIGRAM, KNT.,
VICE-CHANCELLOR.

COMMENCING IN THE

SITTINGS AFTER TRINITY TERM, 8 & 9 VICT. 1845.

PHENÉ v. GILLAN.

1845.

July
10th & 11th.
Aug. 1st.

ON the 12th of July, 1841, the Plaintiff lent the Defendant 880*l*. upon his promissory note, payable twelve months after that date, and also upon the security, by

Transfer, by way of mortgage, of shares in a banking company. The mortgagor afterwards paid

off the debt, and applied for a retransfer of the shares, but the directors of the bank did not permit the retransfer to be made. In the meantime a creditor recovered judgment against their public officer, and threatened execution against the mortgagee, as one of the shareholders:—*Held*, that, where the mortgage was made simply as an absolute transfer, subject to redemption, and nothing had passed binding the mortgagor to take a retransfer of the shares, the mortgagor was not liable to indemnify the mortgagee against debts incurred after the transfer made on the mortgage, and before the mortgage debt was paid off.

That, the mortgagor having elected to take a retransfer of the shares, the mortgagee became a trustee of the shares for the mortgagor, and the mortgagor was bound to indemnify him against the whole expenses or liabilities which he had properly incurred by holding and maintaining the shares.

That the mortgagor, indemnifying the mortgagee in respect of the costs, was entitled to take proceedings in the name of the mortgagee, to compel a retransfer of the shares, and to resist the proceedings against the shareholders under the judgment.

The mortgagee has not, in such a case, any right at law against the mortgagor, *semble*.

Whether the directors of the company, preventing the shares from being retransferred, are necessary parties to the suit, in order to give the Plaintiff complete relief—*quære*.

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 v.
 GILLAN.
 —
Statement.

way of mortgage, of 100 shares in the Western District Banking Company for Devon and Cornwall. The form of the latter security was an authority to transfer the 100 shares from the Defendant to the Plaintiff, and an agreement in the following words :—

“ *P. Phéné, Esq.*

“ July 18th, 1841.

“ Sir,—I hereby acknowledge the receipt of the sum of 880*l.* from you, for which amount I have given my promissory note in your favour, at twelve months date from this day ; and as a collateral security I have delivered to you the certificate of my 100 shares in the Western District Banking Company. Now I hereby authorize you to act upon the notice of transfer of my aforesaid 100 shares at any time you may think proper during the said twelve months ; and I hereby promise and engage to do every act necessary for completing such transfer on my part.

“ I am, Sir,

“ Your very obedient servant,

“ *W. CAMPBELL GILLAN.*”

The Plaintiff applied to the Western District Banking Company to be recognised as having a charge upon the shares ; but he was informed that he could not be acknowledged as having a right to the shares until a regular transfer was executed, and recorded on the register of the bank ; and the Plaintiff accordingly insisted upon having a deed of transfer from the Defendant ; and an indenture, dated the 10th of March, 1842, was accordingly made between the parties, whereby the Defendant assigned the 100 shares to the Plaintiff ; and the Plaintiff thereupon signed an undertaking in the following form :—

“ *W. C. Gillan, Esq.*

“ Sir,—On repayment of the sum of 880*l.*, for which

amount I hold your promissory note, I hereby undertake to deliver back, and, in case of transfer, to retransfer to you, or to whom you may appoint, at your costs, the 100 shares in the Western District Banking Company delivered to me by you, and which I also hold as a collateral security for the payment of the aforesaid sum of money.

“ PHINEAS PHENÉ.

“ *Melksham*, 15th July, 1841.”

The deed of assignment was transmitted to the bank by the Plaintiff, who at the same time requested that his name should not be placed on the register, but was informed in reply that the rules of the bank did not admit of holding the transfer without placing it on the register book, which was invariably done on the receipt of the deed. The transfer was accordingly registered.

The promissory note for 880*l.* was not paid when it became due, but a note for 1000*l.*, payable six months after date, was then given by the Defendant to the Plaintiff, and the Defendant at the same time wrote to the Plaintiff a letter, in which he said, “ When the promissory note is paid, you undertake to transfer to me the 100 shares in the Western District Banking Company now standing in your name in the share register book of that company.”

The 1000*l.* was paid by the Defendant to the Plaintiff on the 4th of August, 1843, and the Plaintiff, on the 23rd of August, applied to the manager of the bank, and received a form of notice of transfer, which he delivered to the Defendant, who signed the same and forwarded it to the company, with a request to allow the 100 shares to be transferred to him from the Plaintiff. Several applications were made to the company by the Defendant for the retransfer of the shares, and, on the 24th of

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v.
GILLAN.
—
Statement.

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v.
GILLAN.

Statement.

April, 1844, the Defendant received a letter from the manager, stating that the directors had not yet allowed the transfer from the Plaintiff.

On the 27th of September, 1844, a creditor recovered judgment against the public officer of the bank, for a debt exceeding 3000*l.*; and, on the 27th of December following, the Plaintiff was applied to by the solicitor of the creditor of the bank, who had obtained such judgment against the public officer, acquainting him, that unless he should pay into the bank on the 4th of January, 1845, 3*l.* 10*s.* per share on the shares which he held, execution would be levied upon him for the full amount of the judgment creditor's debt. The bill was filed on the 17th of January, and prayed an account of the monies and expenses paid or incurred by the Plaintiff since the 20th of August, 1843, by reason of the 100 shares having been transferred into his name; and that the Defendant might be decreed to pay the same to the Plaintiff. The bill also prayed an inquiry respecting the unpaid calls on the shares, and that the Defendant might be decreed to execute to the Plaintiff a sufficient indemnity against the debts and liabilities of the bank, and take all necessary steps for obtaining the retransfer of the shares.

The Defendant, by his answer, said, that the Plaintiff had never communicated to him the circulars from time to time sent to the shareholders shewing the state of the bank affairs; and added, that he had strong ground for believing that the judgment recovered against the public officer was collusive, and that the debt for which it was recovered was not justly due. The Defendant said he believed, that, if a suit were instituted, discovery might be obtained which would sustain an injunction against the judgment creditor, restraining him from proceeding

to execution on the judgment. The Defendant said that he had always been willing to take a retransfer of the shares; and that he had offered to institute proceedings for the purpose of resisting the judgment, if the Plaintiff would allow his name to be used in such proceedings; and that he had offered to give his bond to indemnify the Plaintiff against the consequences of so using his name, but which the Plaintiff had declined to accept or allow.

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Mr. Wood and Mr. Grove, for the Plaintiff, argued, that the Plaintiff must be regarded as a trustee for the Defendant of the shares in the bank; and that he was entitled to be indemnified by his cestui que trust against all the liabilities which he might have incurred. The circumstance, that the Plaintiff acquired the shares as mortgagee, did not make him less a trustee when the mortgage was paid off: *Marsh v. Wells (a)*, *Earl of Ranelagh v. Hayes (b)*, *Balsh v. Hyam (c)*.

Argument.

Mr. Romilly and Mr. Faber, for the Defendant, contended, that a mortgagee was not in the position of a trustee; that the rights of the parties to a mortgage must be determined by the contract between them, and it was no part of that contract that the mortgagor should indemnify the mortgagee against the consequences of holding property which he held for his own security, and not for the benefit of the mortgagor. If any incidental advantage had arisen, as a bonus or payment upon the shares, the mortgagee would have received and applied it in discharge of his debt; and he

(a) 2 Sim & St. 87.

(b) 1 Vern. 189, cited Lord Redes. Tr. Pl. 148., ed. 4. The passage founded on this author-

ity was first introduced in the third edition of the "Treatise on Pleading," p. 120.

(c) 2 P. Wms. 453.

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 —
Argument.

must be supposed to have contemplated all the liabilities to which the possession of the mortgaged property might subject him. There could be no right to indemnity in equity if the law gave no such right, for the contract must be the same in both courts. What were the rights of the parties in equity? The mortgagee was entitled to payment or foreclosure. If payment should be made, the mortgagees might possibly require that it should include not only the debt, but also the expenses of retaining the security; but the mortgagor might be willing to be foreclosed, and on what principle should the equity of the mortgagee in that case go beyond foreclosure? The question is, not what the Court would impose upon the mortgagor if he came to redeem the mortgage; but whether the Court should introduce, in cases of mortgage, a new equity, not incidental either to redemption or foreclosure. They cited *Burnett v. Lynch* (a), *Humble v. Langston* (b).

VICE-CHANCELLOR:—

Judgment.

At the conclusion of the argument in this case, I stated my opinion to be, that the Plaintiff could have no right of action at law against the Defendant in respect of the matters complained of in this suit; and that opinion has been fully confirmed by subsequent consideration. The Plaintiff, by the transfer of the shares, became absolute owner thereof at law, and acquired all the rights, and became subject to all the liabilities of a shareholder, both as between himself and the world, and himself and the other shareholders; and, in the absence of express contract, I cannot make out the principle upon which the law should imply a contract that

(a) 5 B. & C. 589.

(b) 2 Railway Ca. 533.

the Defendant, in the circumstances of this case, should indemnify the Plaintiff against the consequences of the transfer of the shares. The question, therefore, in my opinion is, only whether the Plaintiff has a right to any such indemnity in this court. The case of *Humble v. Langston* (a), though it is not precisely in point, contains some observations which are important, as explaining the principle on which these cases are governed.

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 Judgment.

Now, in order fully to explain the reasoning by which I have come to the conclusion I am about to state, it may be convenient to suppose that the amount recovered against the public officer of the bank consisted of three distinct debts, one of which was contracted before the shares were transferred to the Plaintiff; another after their transfer, and before the debt was paid off; and the third after the debt was paid off.

With respect to the first of these debts, the Plaintiff, subject to any special contract between the parties, would not, I apprehend, *prima facie*, be liable to a stranger; but, as between himself and a shareholder, or between himself and *Gillan*, no doubt he might have been. If, therefore, there is no special case, he would be able at law to defend himself, if that were material, against a claim of any debt contracted before he became a shareholder.

With respect to the third debt, (I reserve the second for the present), the state of the case was this:—The shares were transferred to the Plaintiff on the 10th of March, 1842, to secure a sum of 880*l*. On the 15th of July, 1842, the amount of the loan was increased from 880*l*. to 1000*l*. On the 4th of August, 1843, the debt was paid off by

(a) 2 Railway Ca. 533.

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—
Judgment.

Mr. *Gillan*. On the 25th of August, 1843, the Plaintiff applied to the directors of the company to transfer the shares in question to the Defendant; and, in conformity with the deed of settlement, he signed a notice requiring them so to do, and sent that notice to the Defendant. The Defendant also signed that notice, and transmitted it to the office, and from that date until September, 1843, the retransfer of the shares to the Defendant was pending before the company, who, as I understand, have power under the deed of settlement to negative, upon certain terms, that transfer of shares; and that transfer has been delayed, so far as appears, only by difficulties or delays resting with or occasioned by the directors of the company. During no part of this period did the Defendant require the Plaintiff to act otherwise in respect of the shares than by retransferring them to himself. In the month of September, 1843, a person, alleging himself to be a creditor of the company, recovered judgment against the public officer of the company, and that creditor is proceeding to make the judgment available against the Plaintiff.

The effect of these transactions would, in my opinion, be, to entitle the Plaintiff to the indemnity he asks in respect of the debt supposed to have accrued since the mortgage was paid off. I need not here inquire how the case would have stood if the Defendant, at the time of paying off the money, had repudiated the shares. In fact he did not do so; but, acting upon the right which the original transaction gave him, to call for the retransfer of the shares, he elected to require such retransfer. From the position in which he thus placed the Plaintiff, he cannot, in my opinion, now retire, only because it may turn out that it would have been for his benefit to have repudiated the shares. The tenor of

the original contract, and the time which has since elapsed, may have materially altered the position of the Plaintiff. The effect of the payment of the debt, combined with these subsequent transactions, was, in my opinion, to make the Plaintiff a mere trustee for the Defendant, and so he has continued, with the Plaintiff's consent, down to the time of the institution of this suit, and, consequently, for all practical purposes, down to this time. His rights, therefore, as against the Defendant, are those of a trustee against his cestui que trust, and I cannot doubt but that a trustee, circumstanced as the Plaintiff was, has a right to be indemnified by his cestui que trusts against all liabilities which he may properly have incurred in that character. His liability in this court is that of his cestui que trust.

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 —
Judgment.

I might take the analogous case of a trustee of leasehold property under covenants for the benefit of a cestui que trust. It is quite clear, I apprehend, that, if such trustee were obliged to pay money for the benefit of his cestui que trust, he would have a right of indemnity over; and, therefore, supposing that trust to have commenced on the day when the money was paid, and that the liabilities have been incurred since that time, my opinion is, the Plaintiff is entitled to be indemnified against those liabilities.

The remaining debt (that supposed to have been contracted after the shares were transferred, and before the debt was paid off) raises questions of considerable difficulty. In considering this part of the case, I will first suppose the mortgage to have been in the common form; that is to say, an absolute transfer, subject to redemption, and nothing to have passed by which the Defendant was bound to take the shares again. In that simple case, is the Defendant liable in this court for all the

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Judgment.

engagements of the company, good and bad, in exoneration of the Plaintiff, in the same manner as he would have been if he had continued registered owner of the shares? In that simple case I should incline strongly to say the Defendant would not be liable. The question is not whether the Defendant could redeem the shares without indemnifying the Plaintiff, but whether he is under a personal liability to indemnify him, it being admitted that the company is insolvent, and the shares comparatively valueless. The Plaintiff became a partner for his own benefit, and at law he acquired all the rights and became subject to all the liabilities of a partner. I assume there is not at law any implied contract for the indemnity which the Plaintiff asks. His rights and liabilities during the time he held his shares for his own benefit must be the same in equity as at law, so far as regards the personal liability of the Plaintiff. The position of the parties is without doubt different in equity from what it is at law. At law, the Defendant has no interest in the shares; in equity, he has a right to redeem them: and if he should elect to redeem, he may possibly be bound to indemnify the Plaintiff against all expenses and liabilities, by means of which the shares have become what they are. But although the Defendant may have a right to redeem, he may also waive that right, and submit to be foreclosed; and if he should chose so to do, I cannot think the Plaintiff has any personal demand against him in this Court for expenses incurred in maintaining the mortgage property, which, by that supposition the Defendant does not think fit to claim. Now that appears to me to be the position of the Plaintiff, considered simply as a mortgagee. And, if that would be the case of a mortgage with a common clause of redemption, I think the form of the security in this case would not make any difference. I have stated this view of the case in order that the Defendant may distinctly

understand upon what ground I consider the Plaintiff has some claim against him.

Another question then remains. In this case the Defendant has, in my opinion, bound himself to accept the retransfer of the shares. In effect, he has elected and has bound himself by his election to redeem the mortgage. This he did, or must be supposed to have done, with full knowledge of the consequences. From the time from which he became so bound, he became in equity owner of the shares. Can he claim those shares without paying the Plaintiff the expenses properly incurred in making them what they are; that is, the expense properly incurred in the management? I think not. The profits, if any, would have belonged to the Defendant, and he must also be the loser if a loss has been sustained. Supposing, therefore, the suit to be properly framed, the Defendant having elected to claim, under the original contract, a right to a retransfer of the shares,—having continued to treat with the Plaintiff for the retransfer from the 4th of August, when the money was paid off, down to September, when the action was brought against the officer of the company, and the delay of the retransfer having been occasioned by the acts of the directors, the Defendant never having repudiated the shares, or called upon the Plaintiff to act otherwise than he did, and having treated himself as owner of them,—my opinion is, that the Plaintiff would be entitled to an indemnity.

But this difficulty then occurs—to this suit the directors of the company are not parties. The Plaintiff, therefore, making this demand against the Defendant, is not on this record in a position at once to give him the shares; and the difficulty I have felt is, to determine whether I ought to require the directors to be made parties, or whether, without doing so, I could, in the

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present state of the suit, make such a decree as I think the Plaintiff is entitled to. I am not at present sufficiently informed with respect to the partnership deed. It was admitted on both sides that the deed gave the directors a power to refuse to permit the transfer of the shares, obliging them, in that case, if required by the shareholder who desired to sell, to take them at a price to be ascertained in a way pointed out by the deed; and this being a case, therefore, in which the Plaintiff has no power to give the Defendant the shares, in this suit, it appears to me that the decree, on that part of the case, can go no further than direct that Defendant, indemnifying the Plaintiff, may have leave to take such proceedings in his name as he may think fit for the purpose of compelling a retransfer of the shares, or of compelling the company to purchase them according to the provisions of the deed. Upon that point, however, I wish to call the attention of counsel, to the partnership deed.

With regard to the other part of the case, all I can do is to declare that the Defendant is bound to indemnify the Plaintiff against all liabilities which would have been incurred by the Defendant if he had remained the holder of the shares instead of the Plaintiff, from the time they were transferred to the Plaintiff. I cannot decide, at the present stage of the cause, what liabilities have been properly incurred; but, with regard to this part of the case also, the Defendant, indemnifying the Plaintiff in respect of costs, must be at liberty to take such proceedings as he may be advised in the name of the Plaintiff for resisting the proceedings to which at present the Plaintiff is liable at the suit of the creditor who had recovered the judgment.

It was contended, on behalf of the Defendant, that, in the case of a trustee and cestui que trust, the trustee

cannot proceed in this Court until he has been actually damaged, although, if he had paid anything, he might have come to be indemnified. I do not accede to that proposition. If it was a subsisting liability, the trustee is not bound to be out of funds for a moment. In this case, a judgment was recovered against a public officer of the company; *primâ facie* the Plaintiff is liable as a shareholder, and *primâ facie* he has a right to come to be indemnified in the way suggested.

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It will be for the Defendant to consider whether he can suggest any useful inquiries before the Master to ascertain what liabilities have been properly incurred; for (adverting to what I observe is stated in the answer, and what frequently occurs in these cases), it appears to me that the Defendant must have a right not only to use the name of the Plaintiff in defending these proceedings, and in taking proceedings against the directors to compel the transfer or purchase of the shares, but he must also have a right, in the name of the Plaintiff, to take any proceedings he may be advised for the purpose of shewing that he, with the other shareholders, is not liable to pay the debt; and, whatever decree I make, must be without prejudice to any proceedings which the Defendant may think proper to take against the Plaintiff himself for the purpose of shewing why any liability, to which, *primâ facie*, the Plaintiff would appear to be liable, and in respect of which this decree would give him an indemnity, should in any respect remain. All these points are taken by the answer, and I cannot deprive the Defendant of the right in this suit to impeach those several matters. I am not at present able to say in what form precisely the decree ought to stand, but the observations I have made will explain what appear to me to be the proper declarations.

With respect to the point raised as to the nature of

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the indemnity, the Plaintiff is entitled, at the least, to the recognizance of the Defendant; to be settled by the Master if the parties differ.

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 and 28th.

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A first mortgage of real estate was made to A. in fee. A second mortgage was then made to B. of the same estate, together with other real estate, by a release and conveyance of the respective premises to C., as a trustee for B., with power of sale. B. afterwards advanced a further sum to the mortgagor on the security of the same estates, but gave no notice of the advance to A. or C. Subsequently, C. (after inquiry of A. whether he had notice of any incumbrance other than his own, and that of which C. was a trustee for B.) advanced a further sum to the mortgagor on the same security, and gave notice of his mortgage to A.

BY indentures of lease and release of the 1st and 2nd of June, 1824, between *Washington Pike*, of the first part; *John Gregory Pike*, of the second part; and *John Smith*, of the third part, a parcel of land, in the parish of *St. Allmund*, in the borough of *Derby*, with the buildings thereon, was conveyed to the said *John Smith*, his heirs and assigns, by way of mortgage, for securing 700*l.* and interest. This mortgage was first transferred to *Samuel Hey*, and subsequently to *John Fearné*.

By indentures, dated the 22nd and 23rd of May, 1826, between *Washington Pike*, of the first part; *John Gregory Pike*, of the second part; *John Flewker*, of the third part; and *Sir Robert Wilmot*, of the fourth part, the premises comprised in the foregoing mortgage, and also a second piece or parcel of land containing 600 superficial square yards, with a building thereon, were conveyed to and to the use of *Flewker*, his heirs and assigns, by way of mortgage, for securing 600*l.* lent to *Washington Pike* by *Sir Robert Wilmot*; and the said conveyance was declared to be upon trust that the said *John Flewker*, his heirs and assigns, should permit

Held, that the several mortgages took effect, with regard to the different estates, according to the order of time at which they were respectively created; and that their priorities were not affected by the giving, or the omitting to give, notice to the party in whom the legal estate was vested.

That the doctrine of notice, applicable in determining the priority of charges on choses in action, does not prevail as to equitable estates in land.

Washington Pike and his heirs to remain in possession of the premises until the 23rd of November then next, being the day appointed for the payment of the 600*l.* and interest; and upon trust, after such payment, to reconvey the premises to *Washington Pike*; but, if the 600*l.* and interest should not be paid on the said 23rd of November, then that *Flewker* and his heirs should thereafter, when and as he or they should think fit, sell and convey the mortgaged premises, and, out of the proceeds of any sale or sales, pay, first, the costs and expenses of the sale and execution of the trusts; secondly, the principal and interest due on the 700*l.* secured in the first mortgage; thirdly, the principal and interest of the mortgage debt of 600*l.* to Sir *Robert Wilmot*; and, lastly, the surplus to *Washington Pike*, his executors and administrators.

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Sir *Robert Wilmot* died in 1834, and appointed the Plaintiffs his executors. By indenture, dated the 3rd of July, 1835, between *Washington Pike* of the first part, and the Plaintiffs of the second part, reciting the foregoing charges of 700*l.* and 600*l.*, and that the Plaintiffs had advanced a further sum of 400*l.* to *Washington Pike*, for which he had executed his bond, the said *Washington Pike* covenanted and agreed with the Plaintiffs, that, in case the said sum of 400*l.* and interest secured by the bond, or any part thereof, should remain unpaid on the 3rd of January then next, and should not be paid by the space of two months next ensuing, then that *Flewker* and his heirs should, at any time thereafter, at the request of the Plaintiffs, sell and dispose of the said messuages and premises, and, out of the proceeds of such sale, after payment of the costs and expenses, and the said sums of 700*l.* and 600*l.*, repay the Plaintiffs the said sum of 400*l.* and interest, and pay the surplus (if any) to *Washington Pike*.

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By indentures of lease and release of the 9th and 10th of July, 1840, made between *Washington Pike* of the one part, and *Flewker* of the other part, *Washington Pike* conveyed the said messuages and premises to *Flewker* and his heirs, by way of mortgage, to secure 300*l.* advanced by him to *Washington Pike*, together with interest for the same, subject, as to the hereditaments comprised in the indentures of the 3rd and 4th of June, 1824, to the trusts therein contained, and, as to all the said hereditaments, to the trusts contained in the indentures of the 22nd and 23rd of May, 1826, for securing the sums of 700*l.* and 600*l.* respectively. *Washington Pike* covenanted to pay the 300*l.* and interest on the 10th of January then next; and, in default of payment, *Flewker* was thereby empowered to sell the property, and, after the payment of the 700*l.*, 600*l.*, and 300*l.*, the surplus (if any) was to be paid to *Washington Pike*.

In July, 1844, the executors of Sir *Robert Wilmot* filed their bill against *Washington Pike*, *John Gregory Pike*, *John Flewker*, and *Fearne*, in whom the first mortgage was then vested, praying a sale of the mortgaged premises, and the application of the proceeds, and the rents and profits until the sale, in the payment of the first mortgage of 700*l.*, and then in satisfaction of the subsequent mortgages of 600*l.* and 400*l.*, to Sir *Robert Wilmot* and the Plaintiffs.

The Defendant, *Washington Pike*, admitted the four mortgages, and that the mortgaged premises were an insufficient security for the whole. *John Gregory Pike* claimed no beneficial interest in the property. *Flewker*, by his answer, insisted upon his right to priority in respect of his mortgage of 300*l.* over the third mortgage, which was made to the plaintiffs by way of further

charge to secure the 400*l.* due to them upon the bond. He submitted, that the Plaintiffs ought to have given him (*Flewker*) notice of the further charge of 400*l.*; and that, owing to his having had no notice of such further charge, he (*Flewker*) had been induced to lend the 300*l.* on the security of the mortgaged premises. He alleged that he had taken the precaution of inquiring of the first mortgagee and his solicitors, whether they had notice of any other incumbrance. The Defendant *Flewker* also examined a witness, who proved, that, on the 22nd of January, 1841, he, by the direction of *Flewker*, served the solicitors of the first mortgagee with notice of the security for 300*l.*, executed by *Washington Pike* to *Flewker*.

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Mr. *Wood* and Mr. *Renshaw*, for the Plaintiffs, submitted that the doctrine with regard to the effect of notice by an equitable incumbrancer to the party having the legal interest, laid down in the cases of *Dearle v. Hall* (a), *Loveridge v. Cooper* (b), and *Foster v. Blackstone* (c), did not apply to interests in real estate; and that the priority in title must be determined by the priority of the several conveyances in point of time: *Jones v. Jones* (d), *Beckett v. Cordley* (e).

Argument.

Mr. *Jervis*, for the Defendants *Washington Pike* and *John Gregory Pike*.

Mr. *Romilly* and Mr. *Faber*, for the Defendant *Flewker*, relied on the case of *Foster v. Blackstone* as an authority for the application of the same rule as to

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| (a) 3 Russ. 1. | 332; 3 Cl. & Fin. 456. |
| (b) Id. 30. | (d) 8 Sim. 633. |
| (c) 1 Myl. & K. 297; S. C. | (e) 1 Bro. C. C. 353. |
| <i>Foster v. Cockerell</i> , 9 Bligh, N. S., | |

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notice, with reference to land vested in a trustee for sale, as to choses in action. They contended, also, that, whatever might be the rule to be applied with reference to the premises comprised in the first mortgage, as to the additional land comprised in the second mortgage, *Flewker* had the legal estate, and must be regarded, as to the 300*l.*, as the second incumbrancer.

Mr. *Wood*, in reply, said, that the land, in this case, was not converted, and must be governed by the rules of law applicable to real estate: *Bourne v. Bourne* (a).

VICE-CHANCELLOR:—

Judgment.

At the time the bill was filed, the legal estate in the property comprised in the first mortgage of June, 1824, was vested in *Fearne*, as first mortgagee, for securing 700*l.* The property which was the subject of that mortgage, and also additional property, consisting of about 600 square yards of land, comprised in the deed of May 1826, was vested in *Flewker*, as trustee, for securing 600*l.* and interest to Sir *Robert Wilmot*. *Flewker*, therefore, as trustee, was second mortgagee of the property comprised in the first mortgage, and first mortgagee of the additional property comprised in the mortgage of May, 1826. The question in the cause arises between the third and fourth mortgages of July, 1835, and July, 1840, respectively.

The Defendant *Flewker* insists, that neither *Fearne*, the first mortgagee, nor himself, as mortgagee in trust, had notice of the third mortgage at the time he advanced his money upon, and took the fourth mortgage; and he claims priority over the third mortgagee upon

(a) 2 Hare, 35.

that ground. In support of the argument, he relies upon *Dearle v. Hall* (a), *Loveridge v. Cooper* (b), and *Foster v. Blackstone* (c). He has also made a second point, namely, that, if his fourth mortgage is not entitled to priority over the third mortgage to the full extent, he is, at all events, entitled to such priority to the extent of the additional property comprised in the mortgage of May, 1826; and for this he relies upon the general proposition that he has the legal estate in that additional property, and had no notice of the third mortgage at the time he advanced his money on the fourth.

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Now, with respect to the first point made by the Defendant, I do not of course presume, at this day, to question the authority of the cases upon which the Defendant has relied. But, when called upon to apply those cases to a case like that before me, I am bound to examine the reasoning upon which those cases proceeded. That reasoning is, in part, applicable to equitable interests in land, as much as to equitable interests in pure personal estate. But the expressions of Sir *Thomas Plumer* are applied to personal property. The whole object of his argument was to shew by what acts a perfect transfer of an equitable interest in property not capable of actual delivery could be effected; and it is impossible to read his very elaborate judgments in *Dearle v. Hall* and *Loveridge v. Cooper* without seeing that his opinion as to the mode of transferring such property (contrary to his opinion in *Cooper v. Fynmore* (d)) was borrowed entirely from the decisions in bankruptcy, as to the acts which were necessary,

(a) 3 Russ. 1.

(b) Id. 30.

(c) 1 Myl. & K. 297; S. C., 9

Bligh, N. S., 332; S. C., 3 Cl.

& Fin. 456.

(d) 3 Russ. 60.

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under the statute, to take a chose in action out of the order and disposition of a bankrupt; and it is deserving of remark, that, in the argument of those cases, as well as of the case of *Foster v. Blackstone* at the Rolls, and in the judgment of the Court in each of those cases, no allusion whatever is made to equitable interests in land, as being within the principle of the cases then under consideration. It was not, I think, until the argument of *Foster v. Cockerell*, in the House of Lords, that the appellant's counsel referred to conveyances of equitable interests in land, as furnishing an undisputed precedent that such conveyances are perfect and complete, without notice to the trustees in whom the legal estate may be vested. However, in *Jones v. Jones (a)*, an attempt was made to apply the doctrine in *Dearle v. Hall*, and the other cases, to equitable interests in land; but the *Vice-Chancellor*, upon the undoubted authority of cases to which he referred, shewed that those cases had no application to conveyances of equitable interests in land; and with this opinion agree all the modern text-books.

The only question, therefore, in my opinion, is, whether the interest of Sir *Robert Wilmot*, under the mortgage of May, 1826, is to be considered as an interest in land, or an interest in money to be produced by the sale of land. My opinion is, that his interest is that of a second mortgagee of the equity of redemption of the property in mortgage, notwithstanding the form of the security gives his trustee a power of sale.

I have read the pleadings in *Foster v. Blackstone*, and the case is treated as one in which the respective rights of *Foster* and Sir *Charles Cockerell* were to be adjudicated upon with reference to the facts that the estates

(a) 8 Sim. 633.

of the Duke of *Marlborough* had actually been sold, and that money (the proceeds of such sales) in the hands of the trustees was the subject of contest between the parties; and I think the judgment of the House of Lords proceeded upon the assumption, that the Court was applying the doctrine in *Dearle v. Hall* to pure personal estate. I think, therefore, upon the authority of the cases I have referred to, that the first point (wanting altogether the specialty which is found in the second point) must be decided in the Plaintiffs' favour.

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Upon the second point made by the Defendant *Flewker*, my opinion, after some fluctuation, is, that the Defendant is right. Suppose *Flewker* had sold under the power contained in the second mortgage, as he had clearly a right to do, and, after retaining in his hands the sums of 700*l.* and 600*l.* to answer the respective claims of the first mortgagee, and of Sir *Robert Wilmot*, to have paid over the surplus to *Washington Pike*,—could it be said that, by so doing, he had rendered himself liable for a breach of trust? It clearly could not. And again, if, instead of the sale which I have supposed, *Washington Pike* had contracted with the executors of Sir *Robert Wilmot* for a third mortgage to them, of which contract *Flewker* had no notice; and suppose, that, before the completion of that transaction, there had been a deed between *Washington Pike* of the first part, *Flewker* of the second part, and a fourth mortgagee of the third part, by which *Washington Pike* had assigned over the equity of redemption of the estate to the fourth mortgagee, for the purpose of securing the payment of his debt; and that *Flewker* had then declared himself a trustee for that fourth person. Assuming, for a moment, that the effect of such a deed would have been to give the new mortgagee a priority over Sir *Robert Wilmot's* executors, I apprehend that would clearly have been no breach of trust. Sir *Robert Wilmot's* executors not having given any

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notice to *Flewker*, the latter would have been justified in declaring such trusts of the surplus as *Pike* should direct. Then the question is, whether the effect of such a deed would have been to give a priority to the fourth mortgagee. Now, the general rule,—the rule relied on by Mr. *Wood* as to equitable interests in land,—is the rule “*Qui prior est in tempore potior est in jure* ;” and I have, on the former point, decided that neither the omission of one mortgagee to give notice, nor the activity of the other, would, in the circumstances of that case, give the second mortgagee priority over the first. But, if a first incumbrancer has a declaration of trust only by the borrower, and none by the trustee, and the second incumbrancer has a formal mortgage of the equity of redemption, and the trustee is a party to the deed, and declares himself a trustee for the second incumbrancer, will not that declaration by the trustee give the second priority over the first? I think the second would, in that case, have a better right to call for the legal estate than the first; and if it would be so in the case of a stranger, I think the trustee cannot be precluded by his situation as trustee from claiming the benefit of the legal estate without notice. His case, however, might, perhaps, be supported on the simple ground, that he had the legal estate, and advanced his money without notice, leaving every trust of which he had notice untouched by his present claim. I have referred to the cases of *Stanhope v. Earl Verney* (a) and *Maundrell v. Maundrell* (b); from which it appears, that, as to the trusts of a term, a declaration in form by a trustee, that he will stand possessed of the term, is held equivalent to an assignment, so as to give the preference to the party who gets the declaration over one who has a good equitable interest, but not in the same form. I believe that attention to

(a) 2 Eden, 81.

(b) 10 Ves. 271. And see 1 Sugd. Vend. 782, 11th ed.

this distinction will clear up nearly all that is apparently conflicting in the reported cases. A declaration of trust by a trustee, in whom the legal estate is, has always been considered of great weight in the determination of equitable rights (a).

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THIS Court doth declare, that, as to and in respect of the whole of *Decree*. the hereditaments and premises comprised in the indentures of lease and release of the 1st and 2nd days of June, 1824, in &c., the mortgage created and effected by the indenture of the 3rd of July, 1835, in &c., for securing to the Plaintiff the sum of 400*l*. interest and costs, is prior, in point of charge, to the mortgage created and effected by the indentures of lease and release of the 9th and 10th days of July, 1840, in &c., for securing to the Defendant *John Flewker* the sum of 300*l*. and interest and costs. And this Court doth declare, that, as to and in respect of so much and such parts of the hereditaments comprised in the said indenture of the 3rd of July, 1835, as were not comprised in the said indentures of lease and release of the 1st and 2nd days of June, 1824, the aforesaid mortgage, for securing to the said Defendant *John Flewker* the said sum of 300*l*. interest and costs, is prior, in point of charge, to the mortgage created and effected by the said indenture of the 3rd day of July, 1835, for securing to the Plaintiff the sum of 400*l*. interest and costs. And this Court doth order, that the whole of the said hereditaments and premises be sold, &c. And it is ordered, &c., state &c., the amount of the monies which shall arise and be produced by sale of so much and such parts of the hereditaments and premises comprised in the indenture of the 3rd of July, 1835, as were also comprised in the indentures of lease and release of the 1st and 2nd days of June, 1824, and also &c., the amount of the monies which shall arise and be produced by sale of so much and such parts of the hereditaments and premises comprised in the said indenture of the 3rd of July, 1835, as were not comprised in the said indentures of lease and release of the 1st and 2nd days of June 1824. And it is ordered, &c. to take an account of what is due for principal, interest, and costs, other than the costs of this suit, in respect of the several mortgages and incumbrances in and upon or affecting the said hereditaments and premises; and &c. how much is due in respect of each such incumbrance respectively. Account of rents and profits received by *Flewker*. Receiver to be continued. Further directions and costs reserved. Liberty to apply.

(a) See *Meek v. Kettlewell*, 1 Hare, 464; *M^r Fadden v. Jenkyns*, Id. 458; *Hughes v. Stubbs*, Id. 476.

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11th July.

The testator appointed A., B., and C. executors and trustees of his will, providing, that if either of them, or any succeeding trustee or trustees should die, or refuse or neglect, or become incapable to act in the trust, it should be lawful to and for the survivor of them, the said A., B., and C., and such new trustee or trustees to be nominated in their or either of their stead, to appoint a new trustee or new trustees instead of the said A., B., and C., or either of them, or any future trustee or trustees so dying, or desiring to be discharged, or refusing or neglecting, or becoming incapable to act as aforesaid. A. having disclaimed the trust, and B. having died, C.

alone (though not the survivor of A., B., and C.) appointed new trustees under the power:—*Held*, that the new trustees were well appointed.

A party entitled to, or taking by assignment a legacy, or a share of a residuary estate, may institute a suit for the administration of such estate at any time before the complete administration of the assets, or before such legacy or residuary share is withdrawn from its position as assets unadministered, and constituted a trust fund applicable to the specific trusts of the will; but, *semble*, where the right is unnecessarily exercised, the Court may make the decree without costs.

CAFE v. BENT.

THE testator, *John Brown*, by his will, dated in February, 1826, after directing that his debts and funeral and testamentary expenses should be paid as soon as conveniently might be after his decease, and devising his freehold messuage therein mentioned to his son, *John Brown*, and his assigns, for life, with remainder over, gave and bequeathed his messuage, No. 29, *Clipstone-street*, with the appurtenances therein described, and the materials belonging to his bricklaying or building business, to his said son, *John Brown*, his executors, &c., for the residue of the term, and subject to the covenants contained in the lease thereof for his and their own use and benefit absolutely; and as to the household goods, wines, and every other article in and about his said dwelling-house, in *Clipstone-street* aforesaid, except the fixtures; and also as to all his household goods and wines in and about his dwelling-house at *Lower Halliford*, the testator desired that the same should be sold by his executors, as soon as conveniently might be after his decease, and the money to arise by such sale, after paying the expenses thereof, the testator desired should be laid out in the purchase of £3 per cent. Consols, in the names of his executors, upon the trusts thereafter mentioned. And the testator gave to his said son, *John Brown*, *John White*, and his son-in-law *John Bent*, his freehold messuages and the appurtenances at *Lower Halliford*, and the garden ground behind the same, held

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of certain trustees, together with the effects on the premises therein mentioned, to hold such parts of the premises as were freehold unto and to the use of the said *John Brown*, and *John White*, and *John Bent*, and their heirs and assigns, for ever, upon the trusts thereafter mentioned, and to hold such parts thereof as were leasehold unto the said *John Brown*, *John Bent*, and *John White*, their executors, &c., for the term the testator had therein, upon the trusts thereafter mentioned, subject to the rent and covenants reserved and contained in the lease thereof, and to hold the residue of the last-mentioned property and premises unto the said *John Brown*, *John White*, and *John Bent*, their executors, administrators, and assigns, upon the trusts thereafter mentioned. And the testator declared his will to be, that the said trustees should stand possessed of the same respectively, upon trust, as soon as conveniently might be after his decease, to sell and dispose of the said freehold and leasehold premises and effects, and to invest the proceeds of such sale as therein mentioned. The testator then gave to his trustees all his six messuages or tenements in *Beaumont-street*, and also a messuage or tenement in *Clipstone-street*, (excepting a certain stable, which he directed should fall into and go along with the general residue of his estate and effects), to hold the said several messuages or tenements, and premises, with the appurtenants, unto his said trustees, their executors, &c., for the residue of the several terms of years to come therein, upon the trusts thereafter declared. And after bequeathing an annuity of 200*l.*, upon trust, for his son *William Henry Brown*, and also an annuity of 20*l.* to *Mary Latham*, the testator declared, that, as to all the rest, residue, and remainder of his estate and effects, whatsoever and wheresoever, of what nature, kind, or quality the same might be, not thereinbefore specifically bequeathed or disposed of; and all monies to arise and

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be produced by the sale thereinbefore directed, and the stocks or funds in which the same should be invested, and by the sale of the property and effects which the testator had desired should fall into and go along with the general residue of his estate and effects, the testator gave, devised, and bequeathed the same as follows, viz., as to one-sixth part or share thereof, the said testator gave, devised, and bequeathed the same unto his said son, *John Brown*, his executors, &c., to and for his and their own absolute use and benefit; and as to the remaining five-sixth shares thereof, the said testator gave, devised, and bequeathed the same unto the said *John Brown*, and *John White*, and *John Bent*, their executors, &c., upon trust, as to the said two houses, Nos. 16 and 17, *Beau-mont-street*, and one-sixth part or share of the residue of his estate and effects, that his trustees, and the survivors and survivor of them, his executors, &c., should stand possessed thereof, upon trust to pay the rents, issues, interest, dividends, and annual proceeds thereof, unto his said daughter, *Sarah Bent*, the wife of *W. B. Bent*, for her life, for her separate use; and after the decease of his said daughter, upon trust to permit the said *W. B. Bent* to receive and take the rent, issues, interest, dividends, and annual proceeds thereof, for his life, to and for his own use and benefit; and from and after the decease of the survivor of them, *W. B. Bent* and *Sarah* his then wife, upon trust for all and every the child or children of his said daughter *Sarah Bent*, equally to be divided between and amongst them if more than one, and if but one, then to such one child, to be transferred at the age and time thereinbefore-mentioned. The testator then devised and bequeathed the other four-sixth shares of the specific trust property and residue upon like trusts for the benefit of his other four daughters respectively, and their respective children. The will contained provisions for the maintenance

of the children after the decease of their parents,—powers for leasing any of the devised messuages or tenements, to be exercised by the trustees for the time being, with the consent of the respective tenants for life thereof,—and a direction that *J. Brown* the son, or some or one of the trustees acting for the time being, should keep a regular account of the rents and profits of his said estates, and of the dividends and interest of the stock and other personal estate which he or they should collect and receive by virtue of the said trusts, and should be entitled to retain, as compensation for his or their trouble, 5*l.* per centum on the rents so to be collected by him or them, having first paid thereout all ground rents, insurance, and other outgoings and expenses, and 1*l.* per centum on the dividends to be received by him or them; such allowance not to extend to the share of *John Brown*, the son, nor to the annuity of 200*l.* for *William Henry Brown*; and it was provided, that, if either of them, *J. Brown*, *J. White*, or *J. Bent*, or any succeeding trustee or trustees to be nominated in their or either of their place or stead, as thereafter mentioned, should, during the continuance of any of the trusts or powers created by or vested in them by the said will, happen to die, or refuse or neglect, or become incapable to act in the execution of the said trusts or powers, at any time or times before the said trusts or powers should be fully executed and performed, then and in that case, when and so often as the same should happen, it should and might be lawful to and for, and the testator thereby authorised and empowered, “the survivor of them, his said son *J. Brown*, and *J. White*, and *J. Bent*, and such new trustee and trustees to be nominated in their or either of their place or stead, as thereafter mentioned,” by any writing or writings under his or her hand, attested by two or more credible witnesses, to nominate and appoint any other fit and proper person or persons to be a trustee

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tee or trustees for the purposes aforesaid, or such of them as should be then subsisting or capable of taking effect, in the place or stead of the said *J. Brown*, *J. White*, and *J. Bent*, or either of them, or any future trustee or trustees so dying or desiring to be discharged, or refusing or neglecting, or becoming incapable to act in the execution of the said trusts or powers; and the testator directed, that, thereupon, the trust property should be transferred and assigned upon the same trusts to such new trustee or trustees; and such new trustee or trustees should have the same powers as if he or they had been originally named in the said will (a).

The testator died in 1828. *J. Brown*, the son, and *J. Bent*, proved the will; *White* renounced probate, and disclaimed by deed. *J. Brown* and *J. Bent*, as executors and trustees, sold the estates expressly devised and bequeathed for sale, but made no sale or conversion of the leasehold estates which passed under the residuary gift.

The estate, so far as it was sold or got in, was invested in the funds, in the names of *J. Brown* and *J. Bent*. About fifty leasehold houses in various parts of *London* and *Middlesex* remained undisposed of, and the estate was managed and the rents received by *J. Brown* and *J. Bent*, and by *J. Bent* after the decease of *Brown*, and the income was distributed to the tenants for life and the parties interested.

Sarah Bent, the wife of *W. B. Bent*, and one of the daughters of the testator, had five children. One of these children, *Sarah Ann Bent*, died in 1842, intestate,

(a) See *Cave v. Bent*, 3 Hare, 245, on motion to restrain the exercise of this power.

and letters of administration of her estate and effects were granted to the said *W. B. Bent*, her father. *W. B. Bent* then offered for sale by auction the reversionary interest of *Sarah Ann Bent* in the leasehold houses, and in the stock standing in the names of the trustee, and such interest was purchased by the plaintiff and assigned to him by indenture, dated in August, 1842.

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The plaintiff then filed his bill against *J. Bent*, the surviving executor and trustee,—the representative of *J. Brown*, the son,—and all the surviving children of the testator, the children of the testator's children, and the persons taking shares of the residue by assignments from different members of the family, being in the whole more than seventy persons in number. The bill alleged that the defendant, *J. Bent*, was of advanced age, and from bodily infirmity was incompetent to manage the trust estate, and that the stock ought not to remain in his sole control. The bill prayed, that the trusts of the will might be performed, and the usual accounts taken, and the personal estate got in and applied in a due course of administration, and that the leasehold premises not specifically bequeathed might be sold, and the proceeds invested, and the stock transferred into Court. The bill also prayed that new trustees might be appointed in the place of *J. Brown*, the son, and of *J. White*, and for a receiver.

In July, 1843, after the institution of the suit, *J. Bent* (*White*, the person who had refused to accept the trusts, being still living,) executed a deed appointing two other persons as trustees in the place of *Brown*, the deceased, and *White*, the disclaiming trustee, and applied to transfer the stock to the joint names of the three trustees. The plaintiff, who had caused a distringas to be placed on the stock, then received the usual notice,

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that, unless a bill was filed, or an injunction obtained by a certain day, the Bank would permit the stock to be transferred. The plaintiff thereupon brought his supplemental bill, praying a declaration that the new trustees were not duly appointed, and for an injunction to restrain the transfer of the trust funds (a).

Some of the defendants, by their answers, insisted that the interest which the Plaintiff had acquired by his purchase, gave him no right to sustain an administration suit; and that the suit was wholly unnecessary. They also went into evidence, shewing that the Plaintiff had been receiver of the estate for several years, from which office he was removed about the year 1839, and to prove declarations of the Plaintiff, that he had purchased an interest in the estate, for the purpose of involving the family in a Chancery suit, and procuring a decree for the sale of the leasehold property.

At the hearing, Mr. *Walker* and Mr. *Piggott*, for the Plaintiff.

Mr. *Romilly* and Mr. *C. R. M. Jackson*, Mr. *Russell* and Mr. *Bacon*, Mr. *Wood* and Mr. *Rolt*, Mr. *Cooper*, Mr. *Spurrier*, Mr. *Blunt*, Mr. *Cooke*, Mr. *Shadwell*, Mr. *Perry*, Mr. *Shee*, Mr. *Stretton*, Mr. *Paton*, and Mr. *J. D. Taylor*, for the several classes of Defendants.

The questions discussed at the hearing of the cause were, first, whether the Plaintiff had become the purchaser of anything more than the interest of *Sarah Ann Bent*, the intestate, in certain specific property, in the state in which it then stood; or whether the property

(a) See 3 Hare, 247.

assigned to the Plaintiff comprehended also the whole of the interest of *Sarah Ann Bent* in the residuary estate of the testator; 2ndly, supposing that the Plaintiff had purchased only a share in certain specific property, whether he was, in respect of that right, in a position enabling him to sustain a suit for the general administration of the testator's estate; and, 3rdly, if the Plaintiff was entitled to institute a suit for the administration of the estate, whether the residuary leasehold estate of the testator ought to have been sold and converted, or whether the tenants for life were entitled to the enjoyment of that part of the estate in specie. On this point, the cases of *Howe v. Lord Dartmouth* (a), *Pickering v. Pickering* (b), *Daniel v. Warren* (c), *Sutherland v. Cooke* (d), were cited; 4thly, whether the appointment of the new trustees, by Mr. Bent, was within the power. Upon this point all the cases referred to in the former argument (e); and also *Townsend v. Wilson* (f), *Morris v. Preston* (g), *Hall v. Dewes* (h), and *In re Roche* (i), were cited. The case of *Trail v. Bull* (k) was referred to on a point raised on the effect of the payment of the income of the residue, as an assent by the executors, taking the residuary estate out of the situation of assets unadministered, and converting it into a trust estate.

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VICE-CHANCELLOR:—

I did not at any time of the argument entertain, nor have I since entertained any doubt, but that the Plaintiff, as assignee of *Sarah Ann Bent*, was entitled to proceed directly against the executor of *John Brown*,

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(a) 7 Ves. 137.

(b) 4 Myl. & Cr. 289.

(c) 2 Y. & C. C. C. 290.

(d) 1 Coll. 498.

(e) 3 Hare, 248.

(f) 1 B. & A. 608.

(g) 7 Ves. 547.

(h) Jac. 189.

(i) 2 Dr. & War. 287.

(k) Coll. 352.

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the testator, to enforce the rights he acquired as such assignee. The only doubt I have at any time entertained has been as to the specific nature of the relief to which he was entitled. To solve this doubt, I have considered what the rights of the Plaintiff would have been if the assignment had been made, and the bill filed, within twelve months of the death of *John Brown*, before his debts and legacies had been paid, or any effectual steps had been taken to ascertain the residue of his estate and effects. Upon this hypothesis, I will assume, that Mr. *Rolt's* argument is correct,—that the executors had an absolute right to sell the specific property purchased by the Plaintiff, if necessary for the purpose of administering his estate, and that the Plaintiff purchased nothing but the chance of the specific property comprised in his purchase remaining unsold, when the clear residue of the testator's estate should have been ascertained. In this view of the case, (which is the most favourable to the Defendants' argument), I think the Plaintiff had such an interest in the whole and every part of the testator's estate as would entitle him to be a party to the account of the testator's estate, for the purpose, at least, of ascertaining the extent, if any, to which in the due administration of the estate the subject of his (the Plaintiff's) purchase should necessarily or in fact be encroached upon.

If, therefore, I am now to consider the property included in the Plaintiff's purchase as assets unadministered in the hands of the executors of *John Brown*, I think the Plaintiff must be entitled either to have the usual accounts of the estate taken, or to have the property comprised in his purchase (either by the act of the parties or the decree of the Court) withdrawn from its position as assets unadministered, and constituted a trust fund, upon the trusts declared of one-fifth of the

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residue of the testator's estate. The only question upon this part of the case is, whether, before the bill was filed, any act had been done whereby the property comprised in the Plaintiff's purchase had ceased to be assets of the testator unadministered in the hands of his executors, and had become vested in the same persons as trustees of the clear residue of his estate. Now, my opinion is, that I have no case or evidence before me upon which I can safely conclude, that the property comprised in the Plaintiff's purchase had lost its character of assets unadministered at the time the bill was filed. The question may be tried, by inquiring whether, if any party entitled to claim an immediate distribution of one-fifth part of the residue of the testator's estate, had filed a bill claiming one-fifth part of the property in question as ascertained residue, the executors were precluded from insisting upon the usual accounts of the testator's debts being taken before the distribution was made. My opinion is, that there is no circumstance in this case to preclude such right on the part of the executors. If I were to hold otherwise, my decision, if well founded, would preclude every executor and trustee from making any payments to residuary legatees until the accounts of his testator's estate had been taken under a decree of this Court. This disposes of the first point made in the argument, except as to costs, of which I shall presently speak.

The next question to be considered is, whether the leaseholds, which passed by the residuary clause of the will, ought to have been sold under the rule laid down in *Howe v. Lord Dartmouth*. The question depends upon the construction of the will.

[His Honor stated the material parts of the will.]

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Now, in deciding upon the effect of this will, I may observe, that I do not consider the rule laid down in *Howe v. Lord Dartmouth* as, in the least degree, impeached by the more modern cases. Those cases have clearly recognised the rule, and have decided only that in those cases circumstances afforded a necessary inference that perishable property comprised in a general residue was to be enjoyed in specie, notwithstanding its perishable nature. And the question which I have to decide is, whether there are circumstances in this will which ought to satisfy my mind that the testator intended that the leasehold property comprised in the residuary clause of his will should be enjoyed in specie. In the absence of such circumstances, the rule in *Howe v. Lord Dartmouth* must prevail. The leasing power, taken alone, certainly would not afford any such necessary inference. The testator has specifically devised to his three trustees, in trust, divers leasehold messuages and tenements: and the residuary clause does not specifically mention or describe any leasehold or other property, except under the general terms of his estate and effects not before disposed of. Now, this clause would operate upon after-acquired leaseholds. When, therefore, the testator empowers his trustees to grant leases of his messuages and tenements, "so devised to them in trust as aforesaid," the natural, if not the necessary effect of those words appears confined to the leaseholds before specifically bequeathed, and not to such leaseholds as might happen eventually to pass under the general words of the residuary clause.

A direction to sell particular parts of the testator's personal estate is not of much weight on the question of the conversion of the residue; for the rule as to conversion does not proceed on the presumed existence of a definite intention that the property shall be converted, but upon the expressed intention that the legatees shall enjoy the property in succession.

Again, much stress was laid in argument upon the circumstance, that the testator had in terms directed

particular parts of his personal estate to be sold, and had given no such direction respecting his general residuary estate; from which the inference was drawn, that the testator did not intend that his residuary estate should be sold. This argument, standing alone, would have no prevailing effect on my mind. The rule in *Hove v. Lord Dartmouth*, as I understand it, does not proceed upon the assumption that the testator intended his property to be sold, except so far as a testator may be presumed to intend that which the law will imply from the directions in his will. The rule proceeds upon this, that the testator has intended the enjoyment of perishable property by different persons in succession, and this the Court can only accomplish by means of a sale. To this also may, perhaps, be added the consideration, that the argument I am now considering may prove too much; for it will prove (if it proves anything) that no part of the residuary estate was to be sold,—a length to which it would be extremely difficult to carry the argument with success. And the particular instances in which the testator has directed a sale, may, perhaps, be explained by the position of the property to which the direction applies. In one instance, the sale directed is of a property which consists of freehold as well as leasehold and other personal estate, blended together in enjoyment and use. In the two other instances, the sale directed is of household goods and furniture, wines and liquors, in and about two dwelling-houses, which dwelling-houses are specifically bequeathed with the fixtures and appurtenances thereto belonging. It may, I believe, be safely said of all parts of this will which have been referred to in argument, except one that I shall presently notice, that they are circumstances to be regarded by the Court in considering the construction of the will; but by no means sufficient of themselves to evidence the purpose for which

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The direction, that the trustees should retain a percentage on the rents to be collected, fortified by other expressions in the will, regarded as evidence that the testator contemplated the enjoyment of the leasehold property *in specie* by the legatees.

they have been relied upon. The clause I refer to is that in which the testator directs that his son *John*, or one of his trustees, shall retain, as a compensation for trouble, a percentage of the amount of the rents collected; adding, by way of proviso, that this allowance was not to extend to the share of his son *John* therein. Now, after attentively considering this clause, my conclusion is, that the words "share of my son *John* therein" refer in construction to *John's* share in the general residue of his estate, and not to the property specifically bequeathed to him; and, consequently, that the testator has in effect directed, that the percentage in question shall be payable out of the rents of the leaseholds comprised in the residuary clause; and although this direction might, perhaps, be satisfied by applying it to such rents and profits of those leaseholds as should arise before a sale, I think the cases of *Pickering v. Pickering* and *Goodenough v. Tremamendo* (a) are authorities for putting a more precise construction on the word "rents," and for holding that this will carries intrinsic evidence that the testator contemplated the enjoyment in specie of the leaseholds in question. This conclusion is fortified by the other circumstances to which I have referred, although those circumstances, standing alone, would not, in my judgment, have been sufficient evidence of the same intention. I have gone at some length into this question, because I consider myself bound by *Howe v. Lord Dartmouth*, except where I can find a necessary implication to the contrary.

I think the trustees are well appointed. This conclusion might perhaps be supported by the words of the clause itself; for the latter directions in that clause that are applied to the same case, in which, according to

(a) 2 Beav. 512.

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the plaintiff's argument, the "survivor" of the trustees is supposed alone to have had the power of appointing new trustees, are inconsistent with the supposition, that the power could be exercised by the survivor only; but I think the case may be supported on a broader ground. If the three trustees had not been mentioned by name in the introductory part of the clause, it would have been clear to demonstration that the power was annexed to the office of trustee, in which case the disclaimer of one would have vested the office of trustee in the remaining two, and the power would in fact have been exercised by the surviving trustee; and I think the cases referred to justify me in holding that the trustees were so named in the introductory part of the clause, not for the purpose of founding a distinction between them and future trustees, but only because they happened in fact to be the trustees for the time being.

It is very difficult in this case to dispose satisfactorily of the question of costs. I lay out of my consideration entirely the malevolent motives by which the Plaintiff is said to have been actuated in the institution of this suit; but I cannot wholly disregard the fact, that the construction which I have put upon this will respecting the non-conversion of the leaseholds, is that which had been assumed by the family of the testator, and had been acted upon as such from the time of the testator's death down to the institution of this suit,—that the plaintiff purchased and took an assignment of those leaseholds in terms which shewed that his vendor sold, and that he purchased, those leaseholds as a part of the testator's property which had been and was to be enjoyed in specie, and that he has by this suit endeavoured to gain an advantage beyond what was contemplated by the terms of his contract. The bill, how-

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ever, is so framed as not to have added materially to the length of the pleadings by raising the three points instead of one. If the only point in this case had been that which I first considered, I should probably have given the plaintiff the decree which I propose to make upon that subject, but without costs; for, although entitled to the decree, it is, under the circumstances, one of those rights which a party should not vexatiously exact at the expense of others. If the suit had been confined to the second point only I should have dismissed his bill with costs. If the suit had been confined to the third only, I certainly should not have made him pay costs: for the appointment of trustees was not made until after the institution of the suit, and the point of law was one upon which I think he was in such circumstances entitled to the opinion of the Court. Upon the whole, I think the decree should declare that the appointment of new trustees under the will of the testator was a valid appointment; and, the executors of the testator admitting assets sufficient to pay the debts (if any) of the testator now remaining unpaid, declare, that the property comprised in the Plaintiff's purchase is part of the clear residue of the testator's estate and effects, and is to be held by the trustees upon the trusts declared thereof by the testator's will, subject to any means charges affecting the same; and dismiss so much of the bill, with costs, as prays that the leasehold estates of the testator, which pass by the residuary clause of his will, may be sold.

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26th, 27th, &
30th June;
1st July;
13th & 25th
Nov.; 4th &
5th Dec.

The testator gave an annuity to A., and charged the same upon all his freehold and leasehold estate. He afterwards devised his freehold estates to trustees, (who were also his executors), upon trust (subject to the charge) to and for the use of his grandson and his heirs. The trustees, being in possession of the estates, paid the annuity to A. during the minority of the grandson, and within twenty years before the filing of the bill by A. against the grandson:—*Held*, that such payment of the annuity by the trustees prevented the claim of A. to

JOHN KEY, by his will, dated in 1805, after giving an annuity of 200*l.* to his mother, proceeded as follows:—“*I give and bequeath unto Margaret Evans, now living servant with me, an annuity of 20*l.*, to be payable during her life*” (a). He then gave a life interest in a certain mill, or, in the alternative, an annuity of 50*l.* to another person, and proceeded: “I hereby charge and make liable all my freehold and leasehold estates, with and to the payment of the said several annuities given by this my will.” The testator then gave, devised, and bequeathed to *W. Tait* and *B. Greenwood*, their heirs, executors, &c., all his freehold and leasehold estates, upon trust (except as to the collieries and premises therein mentioned, and nevertheless subject to and charged with the said several annuities thereinbefore bequeathed) to and for the use of the first and other son or sons successively of his daughter *Elizabeth Grover*, and their respective heirs, the eldest and first-born of such sons, and his heirs, to be preferred and take before the younger of such sons, and his heirs; with remainder to the daughters of the said *Elizabeth Grover*, and their heirs, as tenants in common. The testator then disposed of the collieries and of his residuary estate, and gave an

the annuity from being barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27, ss. 2, 3.

That the grandson was not a trustee for the annuitant within the 25th section of the stat. 3 & 4 Will. 4, c. 27, or otherwise; and that, under the 42nd section of the same statute, the annuitant was not entitled to recover the arrears of the annuity for more than six years before the filing of the bill.

Where a will was written in ink, and formally executed, and the testator afterwards drew a line in pencil through a clause in the will,—*Held*, that the erasure in pencil raised no presumption of revocation, and that, without other explanation, it was properly regarded not as a revocation of the clause, but as merely deliberative, or indicative of some future and incomplete purpose.

(a) A line was drawn with a pencil through the words in italics.

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annuity of 200*l.* to his daughter and her husband, in succession, out of the rents of his estates; and appointed *W. Tait* and *B. Greenwood* his executors. The testator died in 1808. *B. Greenwood* proved the will and accepted the trusts of the devise; and he paid the annuity of 20*l.* to *Margaret Evans* (afterwards the wife of *John Francis*) from the death of the testator until July, 1827. In December, 1829, the Defendant *Grover*, the eldest son of the testator's daughter *Elizabeth*, attained his age of twenty-one, and entered into possession of the devised estates. In April, 1844, *John Francis* and *Margaret* his wife, filed their bill against the Defendant *Grover*, stating that the personal estate of the testator had been fully administered, and that his leasehold estates had long since expired, and praying a decree for payment of the arrears of the annuity amounting to 843*l.* out of the real estates devised to the defendant; and, in default, that a sufficient part of such real estate might be sold for that purpose.

The Defendant *Grover*, by his answer, said, it was true that the will, as executed by the testator, had contained the bequest of the annuity of 20*l.* to *Margaret Evans*, but that the testator had afterwards cancelled such bequest, by drawing a line in pencil through the whole of the same, which was still visible upon the original will. The answer also claimed the benefit of the statute 3 & 4 Will. 4, c. 27 (a). The executor and trustee was long since dead. At the hearing,

Argument.

Mr. Walker and *Mr. Headlam*, for the Plaintiffs.

The drawing a line in pencil through some of the

(a) An Act for the Limitation of Actions and Suits relating to Real Property, &c.

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words in a will does not amount to a cancellation of that part of the will: *Martins v. Gardiner* (a). It is, at the utmost, deliberative, and indicative of some future intention: *Doe d. Perkes v. Perkes* (b), *Hawkes v. Hawkes* (c), *Winsor v. Pratt* (d). And the presumption of its merely deliberative character is strengthened by the formal character of the instrument as originally prepared: *Edwards v. Astley* (e); and by other circumstances: *Parkin v. Bainbridge* (f). An alteration in pencil on a written instrument is not regarded as final or conclusive, like an alteration in ink: *Ravenscroft v. Hunter* (g). Nor has an instrument written entirely in pencil been considered as equally entitled with an instrument written in ink to be admitted to probate: *Rymes v. Clarkson* (h). It would defeat a testator's intention, if a mark made upon a part of his will, with a substance which he might easily obliterate, should be held so effectually to revoke his deliberate act, that he could not, by effacing the mark, restore that part of his will to its original force; and this, if it were a revocation, he clearly could not do: *Burtenshaw v. Gilbert* (i).

Mr. Romilly and Mr. Elmsley, for the Defendant.

The substance, whether ink or pencil, in which the will of the testator is written, is perfectly immaterial; both may be obliterated: it is merely a question of more or less difficulty. This will appears with a legacy erased. That is pro tanto a revocation: *Larkins v. Larkins* (k). It is for those who insist upon the gift as a part of the will of the testator to shew that the erasure

(a) 8 Sim. 73.

(b) 3 B. & A. 469.

(c) 1 Hagg. 321.

(d) 5 Moore, 484.

(e) 1 Hagg. 490.

(f) 3 Phillimore, 321.

(g) 2 Hagg. 68.

(h) 1 Phillimore, 22.

(i) Cowp. 49.

(k) 3 Bos. & Pul. 16.

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does not indicate the intention of the testator to revoke the legacy; and that the erasure was not made *animo revocandi*, but, on the contrary, was made under circumstances which are capable of explanation: *Lillie v. Lillie* (a), *Barry v. Butlin* (b). The presumption of law arising from the erasure is, that the legacy has been revoked: *Tagart v. Hooper* (c); *Lambell v. Lambell* (d). The striking of the legacy through with a pencil is a sufficient intimation of the intent to revoke; *Bibb d. Mole v. Thomas* (e), *Doe d. Reed v. Harris* (f); and such a mode of erasure was treated by Sir William Grant as a cancellation: *Mence v. Mence* (g).

The annuity in this case, even if not revoked, is barred by the stat. 3 & 4 W. 4, c. 27, ss. 2, 3. The payment, in 1827, by the executor, is not an admission which binds or affects the devisee: *Putnam v. Bates* (h).

[Other points were also discussed, upon which no decision was pronounced until a later stage of the cause.]

Argument.
 July 1st.

VICE-CHANCELLOR:—

The Defendant, in this case, has insisted, first, that the will of the testator, *John Key*, whereby he bequeathed an annuity to the Plaintiff *Margaret*, was revoked by the pencil-mark, which appears to have been drawn through it. If the case turns upon this question, it appears to me that it should be tried at law, the counsel for the Defendant insisting that the Court

(a) 3 Hagg. 184.

(b) Id. 638.

(c) 1 Curt. 291.

(d) 3 Hagg. 566.

(e) 2 W. Bl. 1043.

(f) 8 Ad. & El. 1. See 6 Ad. & El. 209.

(g) 18 Ves. 348.

(h) 3 Russ. 188.

ought not to make a decree for the payment of the arrears of the annuity until a court of law shall have determined the question against him. It was however said, that the Defendant had another ground of defence, which rendered the decision of the first question of no importance,—that the claim to the annuity was barred by the stat. 3 & 4 Will. 4, c. 27. I think the annuity is not barred by that statute. The annuity was paid, in the year 1827, by the party who was then actually in possession or receipt of the rents and profits of the estate, not adversely, but according to the trusts of the will. I do not think there is any ground for saying that the annuity is barred. The payment up to 1827 is sufficient to take the case out of the statute. It is, therefore, not at present necessary that I should give any opinion on the point urged by Mr. *Walker*, that the charge of the annuity on the real estate has created a trust; nor on the subordinate question raised on behalf of the Defendant, that the arrears of the annuity should be at least confined to six years before the filing of the bill.

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—
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The form of the issue should follow that in *Powell v. Mouchett* (a).

DIRECT an issue, whether the words "I bequeath," &c. (b), contained in a certain paper writing, bearing date the 23rd of October, 1805, and produced in this cause, were part of the last will and testament of *John Key*. The plaintiff in equity to be plaintiffs at law.

Minute.

THE issue was tried at the Bristol Summer Assizes. The will was produced by the deputy registrar of the court of the diocese of Llandaff, with the pencil-mark upon it, which appeared to have been drawn through the clause bequeathing the annuity; no other evidence

Statement.

(a) 6 Madd. 216.

(b) See p. 39.

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was given. The learned Judge (Mr. Justice *Erle*) before whom the issue was tried directed the jury, that the external act of cancellation was not of itself conclusive as to the revocation of the bequest, but that they were to determine, from the nature of the act done, and the formal character of the will as it originally stood, and the other facts of the case, whether that act was done *animo revocandi*, or whether it was merely deliberative. The jury found for the Plaintiffs. The Defendant moved for a new trial.

Argument.
 —
 Nov. 13th.

Mr. *Romilly*, Mr. *Montagu Smith*, and Mr. *Ebbsley*, for the motion, contended, that the effect of the direction to the jury had been, that they ought to find a verdict for the Plaintiffs, unless the Defendant proved that the testator had revoked that part of the will; and that this was a misdirection, inasmuch as it displaced the onus which properly lay upon the plaintiffs. The will came out of the proper custody at the death of the testator: it bore upon it the pencil line drawn through the clause in question. The erasure, therefore, was to be presumed to have been by the testator. It expressed that the testator meant by this inchoate act to alter his will, unless he should rub out the mark, and so efface all trace of his intention, and again set up the clause. The line in pencil was as much a part of the instrument, and as much to be regarded, as the words in ink, *Dickenson v. Dickenson* (a): and the Defendant had properly abstained at the trial from giving any evidence, leaving it to the Plaintiffs to make out their case, and disprove that cancellation was intended. The cases cited on the former argument were again referred to, and also *Richards v. Mumford* (b).

(a) 2 Phillimore, 173.

(b) *Id.* 23.

Mr. *Walker*, Mr. *Barstow*, and Mr. *Headlam*, for the Plaintiffs, opposed the motion, and argued that the burden of proving the cancellation lay upon the Defendant, and that the jury had been properly directed on that point. The will as originally executed was certainly in favour of *Margaret Evans*, the act or mark subsequently made was at least equivocal; and, if nothing more was shewn to explain the case, there was no presumption of law which would destroy the effect of a positive act by an equivocal one: *Kirke v. Kirke* (a), *Sutton v. Sutton* (b), *Onions v. Tyrer* (c).

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Argument.

The VICE-CHANCELLOR said, that he did not think there had been any misdirection in the summing-up of the learned Judge. The learned Judge had left it to the jury to determine, whether the testator, in making the erasure on his will, had finally decided to revoke the bequest of the annuity: he told them that there was the external mark of cancellation, but that that mark was not conclusive, and that it was for them to decide *quo animo* the act was done. He then called the attention of the jury to the habit of the testator's mind, as shewn by the clear and formal character of the instrument as it originally stood. He would however reserve his judgment on the motion until after the argument of the case on the equity reserved, when the same point of law would, probably, be re-argued.

Judgment.

Mr. *Walker* and Mr. *Headlam*, for the Plaintiffs.

Nov. 25th.

Mr. *Romilly* and Mr. *Elmsley*, for the Defendant.

(a) 4 Russ. 435.

Vern. 743. See Cowp. 52, *per*

(b) Cowp. 812.

Lord Mansfield.

(c) 1 P. Wms. 313; S. C., 2

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 —
Argument.

It is not necessary to repeat the arguments on the question of cancellation. The other points argued were, whether, as the Defendant contended, the arrears of the annuity ought to be confined to six years before filing the bill, under the stat. 3 & 4 Will. 4, c. 27, s. 42: *Harrison v. Duignan* (a), *Hughes v. Kelly* (b); or whether, as the plaintiffs contended, the Defendant was a trustee for the payment of the annuity, and in that character liable to account without reference to the statute: *Hargreaves v. Michell* (c), *Ward v. Arch* (d), *Young v. Lord Waterpark* (e), *Ravenscroft v. Frisby* (f). The devisees in trust, by whom the annuity was formerly paid, were clearly trustees, as well for the annuitant as for the Defendant: *Doe d. Player v. Nicholls* (g); and the rule was, that the estate of the trustee should be held to continue so long as any of the trusts for which it was given remained to be performed.

Judgment.
 —
Dec. 5th.

VICE-CHANCELLOR :—

Three questions were argued in this cause: first, whether the clause in the will giving the annuity was or was not cancelled or revoked by the pencil erasure; and if not, secondly, whether the annuity was bound by lapse of time: and if the first two questions were answered in favour of the Plaintiffs, how many years' arrears were recoverable? This being a charge upon land, the first question was sent to a court of law, and the jury, under the directions of the learned Judge, found that the annuity was not revoked by the pencil alteration. A motion was then made for a new trial, and the ground of the application was not so much that the ver-

- (a) 2 Dr. & War. 295.
- (b) 3 Dr. & War. 462.
- (c) 6 Madd. 329.
- (d) 12 Sim. 472.

- (e) 13 Sim. 204.
- (f) 1 Coll. 16.
- (g) 1 B. & C. 836.

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diet was against the evidence, but that the Judge had given improper directions to the jury, and had omitted other directions which he ought to have given. As to the directions given being improper, I see no ground for that observation. The alleged omission was in not directing the jury, that, *prima facie*, the pencil erasure was a revocation, and that they were therefore bound to find the bequest revoked, unless evidence was given to countervail that act. The Judge certainly did not tell the jury that the pencil erasure was a revocation, but only that the act was equivocal, and that they were to decide, from the collateral facts and the nature of the alteration, which was in pencil instead of the more durable material, ink, what effect was to be given to it; and the Judge observed very properly that the testator had taken pains to have the will formally drawn up, and had afterwards made pencil alterations. Omitting the case of *Mence v. Mence* (a), it appears to me, that, in the cases of *Parkin v. Bainbridge* (b), *Ravenscroft v. Hunter* (c), *Lavender v. Adams* (d), *Edwards v. Astly* (e), and *Hawkes v. Hawkes* (f), the learned Judges have all considered that a pencil alteration may be final, or that it may be deliberative; and that, from the nature of the act, they consider it, *prima facie*, as deliberative and not final. That view has always been taken in the ecclesiastical courts—admitting that any circumstance appearing upon the face of the will, or facts appearing by extrinsic evidence, must be taken into account in deciding the question. It is impossible not to feel the force of what the learned Judges have said. Every man who makes an alteration in ink, supposes that alteration to remain, for the material cannot, without much labour, be got

(a) 18 Ves. 848.

(b) 3 Phillimore, 321.

(c) 2 Hagg. 68.

(d) 1 Add. 403.

(e) 1 Hagg. 490.

(f) Id. 821.

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rid of; but with respect to alterations in pencil, the probability is that they have been made as notes for the purpose of altering the instrument, to be changed as the testator thinks fit. The act is deliberative, and I cannot say that the learned Judge did not do right when he so stated the law of the case, and left it to the jury to consider the effect of the alteration. He clearly defined the question intended to be referred to them, and left it to the jury as distinctly as it could be left. In that view, therefore, of the case, I do not see any ground to alter their conclusion. I do not understand Sir *William Grant*, in *Mence v. Mence*, as meaning to lay down any abstract rule. In that case there was a residuary clause, and a pencil line drawn through the residuary clause, so far as it related to the disposition of the property; but the words "and as to all my ready money, securities for money," &c., which were descriptive of the property, were left standing. Against the residuary clause in the margin the testator had written, "This is to be particularly noted;" giving as a reason for the erasure that he meant to make a different disposition of some portraits and other specific articles. Then, in the residuary clause, there were some directions given as to advances for his natural sons and a nephew, and opposite to that the testator had written in the margin, "This should be modified." Sir *William Grant*, having the erasure and the notes in the margin before him, came to the conclusion that the testator did intend to revoke the residuary bequest; that he intended to revoke it so far as the disposing part went; and that he had intended also not to leave the other part standing against which he had written that it was "to be modified." I cannot understand Sir *William Grant* as intending by this decision to lay down any abstract rule of law different from that which has been recognised by other Judges. In this case I

am of opinion that the learned Judge did not miscarry in point of law, in not directing the jury that they were bound to assume a revocation unless the contrary was proved. The jury were directed to consider the nature of the act done,—the course the testator had taken in executing a formal instrument, and all the surrounding facts which were brought to their attention; and the Judge was satisfied with the verdict. I see no ground for directing a new trial.

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The question, whether the annuity was barred by lapse of time, I disposed of when I directed the trial at law.

The question which remains is, as to the arrears of the annuity recoverable,—whether for only six years before filing the bill, or the entire arrears from the year 1827. I have not a doubt as to the construction of the 42nd section of the act (a). That section declares, “that no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due” &c. That unquestionably confines the plaintiffs in this case to six years’ arrears, unless they are within the saving clause in which land or rent is vested in a trustee upon an express trust, in which case the right of the cestui que trust shall be deemed to have first accrued “at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration (b)” &c. The present case is one of land devised to a person, not upon trust, but subject to and charge-

(a) 3 & 4 Will. 4, c. 27.

(b) Sect. 25. See *Attorney-General v. Flint*, 4 Hare, 147.

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able with an annuity, and the question is, whether the beneficial owner of an estate, charged with the payment of an annuity under a will is a direct trustee, so that the annuitant, though making no claim for twenty years, can afterwards claim the whole arrears. If there be a devise to trustees in trust to pay an annuity, and no purchase for value intervening, the 25th section will govern the case. But this is a devise of land to a person beneficially, subject to a charge. Looking at the 42nd section, it appears to me impossible not to see that there are many cases of express charge, where that section would prevent the annuitant from recovering more than six years' arrears. Suppose the owner of an estate to acknowledge a sum of money to be lent to him, and to agree that certain specific lands shall stand charged with the payment of the money and interest. That is an express charge by contract. If that money is due in the form of a charge, then it is a case contemplated by the 42nd section, in which a person having a direct charge cannot recover. I do not see how to avoid that consequence, except by the argument that there is a distinction between a devise of land to a person subject to a charge, and a charge upon land by act *inter vivos*. But even that argument does not meet the objection; for, by the terms of the act, no "interest upon any sum of money charged upon or payable out of any lands or rent," can be recovered by any action or suit, but within six years (a). Suppose the charge upon an estate to be created by will, yet the Court will not give more than six years' interest. Suppose, again, the testator to give a legacy, and to direct that it shall be a charge upon land with interest until payment. There the charge is created by will, and yet according to the terms of the

(a) Sect. 42.

act interest could not be recovered for more than six years.

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My opinion is, that neither upon principle nor authority can this be considered as a case of express trust within the act as between the plaintiffs and the defendant. Where an annuity is given by will, and the real estate of the testator is charged with the payment of it, and then the estate is simply devised, charged with the payment of the annuity, my opinion is, that that is not a case of express trust within the 25th section of the statute. It is a bequest or devise which creates a liability in favour of the annuitant, but it does not impose any fiduciary character upon the devisee. The cases of *Hughes v. Kelly* (a), and *Harrison v. Duignam* (b), support this conclusion. The arrears of this annuity must therefore be confined to six years.

(a) 3 Dr. & W. 482.

(b) 2 Dr. & W. 292.

COLE v. JEALOUS.

11th & 14th
July.

SAMUEL JEALOUS, by his will, dated in 1840, devised his copyhold estates holden of the manor of *Sutton Holland*, in the county of *Lincoln*, parcel of the Duchy of *Lancaster*, to three trustees, upon trust, to permit his son, *Henry Jealous*, to occupy the same during his life, or to let or demise the same, and pay the rents

Devise of a copyhold estate to three trustees, upon trust to permit A. to occupy the same or receive the rents and profits thereof for his life; and after the death of A. upon

trust to sell the estate and divide the proceeds amongst the children of A.; and gift of the testator's residuary estate to the trustees upon other trusts, but charged with debts and "the costs and charges of proving and executing" the will:—*Held*, that the fines payable on the admission of the devisees in trust to the copyhold estate were not part of the costs and charges of executing the will to be borne by the residuary estate, but that such expenses of admission were a charge upon the copyhold estate so devised.

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and profits to his said son for his life, and after his decease, or in his lifetime, if the trustees should think fit, to sell the said estates, and divide the residue equally amongst the children of his said son. The testator then devised other estates to the same trustees for others of his children, and desired the residue of his estates to be sold, and charged the proceeds of such sale, and the monies to arise from his personal estate, with the payment of his debts, (except the mortgage debts charged on the estates specifically devised), and his funeral expenses, and the costs and charges of proving and executing his said will; and the testator then directed part of the fund to be invested for the benefit of his widow and certain of his children; and, after giving some legacies, he bequeathed all the residue of the monies arising from his real and personal estate to his son *Samuel Jealous*, (one of the trustees), for his own use and benefit; and he appointed the same trustees to be executors of his will.

The Plaintiffs were, after the death of the testator, admitted tenants of the copyhold estate devised to them in trust for the son *Henry* and his children. The fines and fees due to the lord and steward of the manor, upon such admittance, amounted to 480*l.* 5*s.* 6*d.* *Henry Jealous* did not pay this sum, and actions were brought against the Plaintiffs to recover it; whereupon they paid it, as they alleged, out of their own monies, and filed their bill against *Henry Jealous* and his children for repayment.

The Defendants, by their answer, said, that the testator was well acquainted with the customs of the manor of *Sutton Holland*; and that the maximum fine would be required, and knew that the Defendant, *Henry Jealous*, had no means of paying the fine; and that it

was not the intention of the testator that the costs of the admission of the trustees to the copyholds should be raised by sale or mortgage of such estates; but it was his intention that the same should be paid out of the fund provided by him for executing the trusts of the will.

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Mr. Romilly and Mr. Heberden, for the Plaintiffs, mentioned *Rivet's case* (a), and *Holder v. Preston* (b). *Argument.*

Mr. James Parker and Mr. W. M. James, for the Defendants.—The testator has created a particular fund for defraying the costs of executing his will; and that will required that the trustees should procure the legal estate in the copyhold premises to be vested in them; they accordingly, in pursuance of these trusts, were admitted tenants of the manor in respect of this estate, and thereby incurred the legal liability to the lord of the manor. The expenses of the admission are therefore clearly a charge incurred in executing the trusts of the will, and payable out of the residuary fund designated for that purpose. The testator has, moreover, restricted the power of the trustees in mortgaging the estate to the amount already charged thereupon, and allowed them to create a mortgage for that amount only in case of the existing mortgage being called in. It must be therefore inferred, that the testator did not intend the fines to be raised out of the devised estate.

VICE-CHANCELLOR:—

I have read the will in this case, and my opinion is, that the residue ought not to bear the expense of the *Judgment.*

(a) Sir Fra. Moore, 890.

(b) Sorjt. Wilson, 400.

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—
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admission. The general rule is, no doubt, that, where a property is devised specifically, the devisee takes it subject to every burthen upon it; he takes it cum onere, as the common expression is. Mr. *James Parker* argued, that the fine in this case was not a charge upon the estate, and that I think may be admitted. But the proposition, that a party takes an estate cum onere is not confined to these charges, which are, properly speaking, charges upon the estate; it includes all charges which the ownership of the property entails upon the party who takes it, whether they are charges upon the estate or charges upon the person in respect of the estate. In the case of a specific bequest of leasehold property, or copyhold property, no doubt the party to whom it is given would have to pay the charge of taking upon himself the estate. The circumstance that it is given to him for life, with remainders over, does not exempt him, or some of those to whom it is given, from bearing the charge. In this case, it is given to trustees for one party for life, with remainder over for his children; but it is not the less a specific devise of that property, and the charges of the admission must fall upon the beneficial owners, or some of them, unless the words of the will are sufficient to shew that it was the intention of the testator that these charges are to be paid out of the residue of his estate. The residue is given to the trustees, and out of the residue they are, among other things, to pay the costs of executing the will. I apprehend, that, within the description of the costs of executing the will, the charges of admission to copyhold property cannot be included. It is not more a part of the costs of executing the will than the payment of legacy duty is a part of such costs. Without, however, relying on analogous cases, I apprehend, that the expression, "charges of executing a will," has a meaning very far short of including the expenses of admitting

the devisees to a copyhold estate. That is not the import of the words.

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DECLARE, that the fine paid by the Plaintiffs is a charge upon the copyhold estate, devised to the Plaintiffs in trust for the Defendants, *Henry Jealous* and his children: the decree to be without prejudice to any question between the Defendants as to the proportions in which they are to contribute to such fine.

WAY v. BASSETT.

SIR RICHARD BASSETT, *Robert Clarke*, and *Charles Bassett Roe*, carried on the business of bankers at *Newport*, in the *Isle of Wight*, in partnership together, until August, 1825, under the style of *Sir Richard Bassett, Clarke, and Roe*.

4th, 5th, &
7th November.

A. deposited monies with B., C., and D., who were bankers in partnership, and received from them notes, in which they promised to pay him the amount three months

On the 7th of May, 1825, *David Way* deposited with

after sight, with interest. B. died in March, 1837, having appointed C. and another his executors. C. and D. continued the banking business in the same name until 1842, and interest was regularly paid on the notes by the firm until that time,—the payment being indorsed upon the notes, and signed by one of the partners or their clerk. In December, 1843, the executors of A. filed their bill against the executors of B., and the devisees under his will, for payment of the amount of the notes out of the personal or real estate of B.:—*Held*, that the acts of the surviving partners of B. had not the effect of taking the debt upon the notes out of the operation of the Statute of Limitations as against the real or personal estate of the deceased partner.

A creditor of a partnership, against whose debt the estate of a deceased partner is in a suit directly instituted against that estate entitled to the protection of the Statute of Limitations, cannot (on a bill against the surviving partners and the representatives of the estate of the deceased partner, alleging that the surviving partners are indebted to the deceased partner) recover his debt against the separate estate of such deceased partner, on the ground of the equity of the partners amongst themselves to enforce an adjustment of the partnership transactions; for the creditor can at the utmost only stand in the place of the surviving partners as against the estate of the deceased partner, and in such a case the surviving partners have no claim on the estate of the deceased.

Acts done by one of the surviving partners, who was executor of the deceased partner, and which the surviving partners were in that character bound to do, cannot *prima facie* be considered to have been done in the character of executor.

Where a promissory note was made payable at a certain time after sight, with interest thereon, and the interest was duly paid for several years, (as the bill alleged), the Court held, that the note must be taken to have been acted upon according to its form and tenor; and therefore, that the presentment for sight must have been duly made before the interest was paid; and that the payment became due upon the note at the prescribed date after such presentment, and that the Statute of Limitations would begin to run from the time the payment so became due.

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the firm of *Sir Richard Bassett, Clarke, and Roe*, the sum of 400*l.* at interest, and took a receipt for the same as follows:—"No. 295, Bank, *Newport, Isle of Wight*, 7th May, 1825. Received of Mr. *D. Way* 400*l.* on account;—for *Sir Richard Bassett, Clarke, and Roe: C. B. Roe*, 400*l.*, at 3½ per cent. per annum."

In August, 1825, *Robert Clarke* died, and *Thomas Blackford* became a partner in the firm, which then took the style of *Sir Richard Bassett, Roe, and Blackford*.

On the 21st January, 1826, *David Way* deposited with the firm of *Sir R. Bassett, Roe, and Blackford*, a sum of 500*l.*, and received a promissory note as follows:—"No. 435, Bank, *Newport, Isle of Wight*. I promise to pay, three months after sight, Mr. *David Way*, or order, 500*l.*, with interest after the rate of 3*l.* 10*s.* per cent. per annum, value received the 21st of January, 1826;—for *Sir Richard Bassett, Roe, and Blackford: 500*l.* C. B. Roe*. Entered *J. Cowdry*." And on the 22nd January, 1831, *David Way* deposited with the same firm a sum of 1500*l.*, and took a promissory note as follows:—"No. 1332, Bank, *Newport, Isle of Wight*. I promise to pay, three months after sight, Mr. *David Way*, or order, 1500*l.*, with interest after the rate of 3*l.* 10*s.* per cent. per annum, value received, 22nd of January, 1831;—for *Sir Richard Bassett, Roe, and Blackford: C. B. Roe*. Entered *J. Cowdry*." No interest was paid to *David Way* on his deposit during the lifetime of *Clarke*, but he received the interest due on the accountable receipt, and on the two promissory notes regularly, until his death, from the firm of *Sir Richard Bassett, Roe, and Blackford*.

In September, 1831, *David Way* died, having ap-

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pointed the Plaintiffs his executors. On the 28th of February, 1835, the Plaintiffs, as such executors, deposited with the same firm the sum of 1000*l.*, belonging to the estate of *David Way*, for which they received a promissory note, as follows:—"No. 2481, Bank, *Newport, Isle of Wight*. I promise to pay, three months after sight, the executors of the late *David Way*, or order, 1000*l.*, with interest after the rate of 3*l.* 10*s.* per cent. per annum, value received, 28th February, 1835;—for Sir *Richard Bassett, Roe, and Blackford: C. B. Roe.*" The Plaintiffs, as the executors of *David Way*, regularly received the interest on the amount deposited by their testator and themselves from Sir *Richard Bassett, Roe, and Blackford*, during the life of Sir *Richard Bassett*.

On the 12th of March, 1837, Sir *Richard Bassett* died, having devised and bequeathed his real and personal estate to *James White Bassett, Elizabeth Bassett, Charles Bassett Roe*, and others, and appointed *James White Bassett* and *Charles Bassett Roe* executors of his will. After the decease of Sir *Richard Bassett*, the surviving partners, *Roe* and *Blackford*, carried on the business under the same style,—the names, Sir *Richard Bassett, Roe, and Blackford*, being still retained on the door of the bank, and in the books and other documents of the concern; and the Plaintiffs received from the firm the interest on the several deposits. This continued until May, 1842, when the customers of the Bank were invited to transfer their accounts to the *Isle of Wight* Joint-stock Bank. No interest was paid on the deposits after December, 1842. In December, 1843, *Charles Bassett Roe* and *Thomas Blackford* became bankrupt.

On the 13th of December, 1843, the Plaintiffs, the executors of *David Way*, filed their bill on behalf of

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themselves and all other the creditors of Sir *Richard Bassett* against *James White Bassett* and *Charles Bassett Roe*, and the other persons who were devisees and legatees under the will of Sir *Richard Bassett*, praying that an account might be taken of what was due to the Plaintiffs for principal and interest on the deposits, and of all the other debts and liabilities of Sir *Richard Bassett*, at his death; and an account of his personal estate and effects received by *James White Roe* and *Charles Bassett Roe*, and of the rents, profits, and produce of the real estate of Sir *Richard Bassett*, which, since his death, had been received by the said devisees; and an account of what had been paid to his legatees, that the legacies might be refunded, and the real estate sold; and that the personal estate, the legacies when refunded, and the proceeds and rents and profits of the real estate might be applied in satisfaction of the debts of Sir *Richard Bassett*, including what was owing to the Plaintiffs, in a due course of administration.

As a ground for the relief sought, the bill alleged, that *Charles Bassett Roe* was the principal acting executor of Sir *Richard Bassett*; and that, in the payment of interest on the deposits, he had acted as such executor, and had spoken of himself as such executor to the Plaintiffs and the customers of the bank; that the continuance of the name of Sir *Richard Bassett* in the firm, and the fact that *Charles Bassett Roe* was his principal acting executor, were notorious, and contributed much to the credit of the bank; that, after the death of Sir *Richard Bassett*, the Plaintiffs gave credit to the bank on the supposition and belief, that the estate of Sir *Richard Bassett* continued liable, and that *Charles Bassett Roe* represented that estate. The bill stated, that *Charles Bassett Roe* and *James White Bassett* were indebted to the estate of Sir *Richard Bassett* as such trustees and exe-

cutors, and that *Charles Bassett Roe* and *Thomas Blackford* were also largely indebted to that estate. The bill also stated, that the estate of *Sir Richard Bassett* was indebted to divers other persons as well as to the Plaintiffs, in a large amount, and that his real and personal estate, though considerable, was insufficient for the payment of his debts.

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The greater part of the Defendants, by their answers, said that the debts claimed by the Plaintiffs, if any such were ever due, accrued more than six years before the filing of the bill; that the surviving partners had continued the business of the Bank, and assumed the debts of the old firm; and that the Plaintiffs had accepted the credit of the surviving partners; and the Defendants claimed the benefit of the Statute of Limitations.

The payments of interest on the notes were indorsed on the notes from time to time, as they were made; and the indorsement was signed either by the principal clerk in the bank, or by one of the partners. Upon the face of the three promissory notes was written, by *Thomas Blackford*, one of the partners, the words, "Accepted 11th March, 1843—*Bassett & Co.*" At the hearing,

Mr. Romilly and Mr. Giffard, for the Plaintiffs.

Argument.

Sir Richard Bassett was a partner in the bank at the time of his death, and the Plaintiffs were creditors of the bank: they might then have pursued the assets of *Sir Richard Bassett* for their debt: *Primrose v. Bromley* (a), *Cowell v. Sikes* (b), *Wilkinson v. Henderson* (c), *Brown v. Weatherby* (d), *Thorpe v. Jackson* (e). That right

(a) 1 Atk. 89.

(d) 12 Sim. 6.

(b) 2 Russ. 191.

(e) 2 Y. & Coll. 553.

(c) 1 Myl. & K. 582.

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still remains, unless it can be shewn that it has been barred. The Defendants allege that the claim is barred, first, by the operation of the Statute of Limitations; and, secondly, by the acts of the Plaintiffs in accepting the liability of the surviving partners in discharge of that of the deceased. The first answer is, that the debt has been kept on foot by the payment of interest. The interest was due on a debt which was still a partnership debt; for, notwithstanding the death of Sir *Richard Bassett*, the partnership would continue until the affairs should be wound up: *Crawshay v. Collins* (a), *Wilson v. Greenwood* (b), *Crawshay v. Maule* (c). Then the question is, whether the party making the payment was in a situation to bind the partnership and the estate of the deceased partner. Now, the payment was made by the surviving partner; and so long as the qualified partnership remained, and so far as the act which was done was in the execution of the duties or powers which that qualified partnership imposed or gave, the act would bind the partnership: *Whitcomb v. Whiting* (d), *Wyatt v. Hodson* (e), *Channell v. Ditchburn* (f), *Cross v. Beddingfield* (g). The fact, that the partnership was otherwise dissolved, *Wood v. Braddock* (h), and that one of the partners was dead, *Burleigh v. Stott* (i) does not prevent the admission thereby made from binding both the contracting parties,—the survivors, and the estate of the deceased. The interest was paid, moreover, not only by one who was surviving partner, but by one who was also executor of the deceased partner; and all the effect would be given to that payment which could be attributed to it, supposing it to be done in either character:

(a) 15 Ves. 218.

(b) 1 Swans. 471.

(c) Id. 495.

(d) Doug. 652; and see 1
 Smith's Leading Cases, p. 318.

(e) 8 Bing. 309.

(f) 5 M. & W. 494.

(g) 12 Sim. 35.

(h) 1 Taunt. 104.

(i) 8 B. & C. 36.

Vulliamy v. Noble (a). But, apart from the effect of the payment of interest, the debt was the debt of the firm, and to be paid out of the partnership property. Now, every partner was entitled in equity to have the accounts of the partnership taken, the debts got in, the liabilities paid off, and the surplus divided, or the deficiency supplied, amongst or by the several partners, according to their respective shares or rights. This equity of the partners themselves, a creditor of the partners was entitled to pursue: *Ex parte Williams* (b), *Ex parte Kendall* (c), *Gray v. Chinwell* (d). If the accounts between the partners were open and unsettled, and the surviving partner were still liable, the deceased partner could not be discharged: *Braithwaite v. Britain* (e), *Winter v. Innes* (f). In this case, moreover, the form of the promissory notes prevented the operation of the Statute of Limitations as to them. The promise was to pay, not at any certain date, but "three months after sight." The debt, therefore, was not due until three months after presentation for payment; and the notes were not presented for payment until March, 1843; it was therefore only from that date that the statute could be said to run: *Sutton v. Toomes* (g), *Dixon v. Nuttall* (h), *Holmes v. Kerrison* (i). The absence of any presentation of the notes, in fact, for sight, until 1843, is apparent on the circumstances. The interest was evidently paid upon the notes as soon as it was demanded: there is nothing to intimate that the note was presented for "sight" at a certain time, and again for payment of the interest three months afterwards. The strict tenour of the notes was not therefore pursued; the notes were

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(a) 3 Mer. 614.

(b) 11 Ves. 3.

(c) 17 Ves. 520, 526.

(d) 9 Ves. 118.

(e) 1 Keen, 203.

(f) 4 Myl. & Cr. 101.

(g) 7 B. & C. 416.

(h) 1 C., M., & R. 307.

(i) 2 Taunt. 323.

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never in fact presented for "sight," but the payment of interest was made without any such previous presentment, and, therefore, before the interest was strictly due, and evidently in consideration that the holders of the notes should not present them for payment. The facts which appear also plainly negative any acceptance of the liability of the surviving partners in exoneration of the estate of the deceased: *Devaynes v. Noble* (*Sleech's case*) (a), *Bishop v. Church* (b). The facts shew, on the contrary, that both of the executors of Sir *Richard Bassett* knew of and concurred in the proceedings of the surviving members of the firm, whereby the name of Sir *Richard Bassett*, their testator, was continued in the firm, and their customers were led to believe that *Charles Basset Roe* was acting in the business of the bank, not only as a partner himself, but as the executor of the deceased: *Hankey v. Hammond* (c), *Vulliamy v. Noble* (d), *Evans v. Drummond* (e).

Mr. *Wood*, Mr. *James Parker*, Mr. *Teed*, Mr. *Piggott*, Mr. *Rogers*, Mr. *A. J. Lewis*, Mr. *Beavan*, Mr. *Prior*, Mr. *Bevir*, Mr. *Bovill*, Mr. *Anstey*, and Mr. *Nicholl*, for the several Defendants.

It is true, that the partnership continues after a dissolution until the joint-contracts of the partners are fulfilled, or the joint liabilities are determined. But it does not continue so as to enable the surviving or continuing partners to make a new contract; and to that extent the argument must go, if it be insisted that any act or conduct of the surviving or continuing partners can keep alive a debt or obligation, or otherwise augment or prolong any liability of the estate of the deceased partner, which, but for such act or conduct, would

(a) 1 Mer. 568.

(b) 2 Ves. 100.

(c) 10 Ves. 113, n. 33.

(d) Ubi supra.

(e) 4 Esp. 89.

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have been extinguished. There is no authority whatever for the proposition, that anything done by a surviving partner can have such an effect; and there is, on the other hand, clear authority that it cannot: *Atkins v. Tredgold* (a), *Slater v. Lawson* (b), *Ault v. Goodrich* (c), *Scholey v. Walton* (d), *Barber v. Buttress* (e), *Ex parte Woodward* (f). If no act of the surviving partner can affect the estate of the deceased, it is unnecessary to discuss the consequences of particular acts,—as for example, the continued use of the name of the deceased partner by the survivors. But, it is plain, the estate of the deceased partner could not be rendered liable by that circumstance: *Webster v. Webster* (g). And the same may be said of the indorsement by the clerk of the interest paid on the notes, and of the acceptance by one of the surviving partners: *Tullock v. Dunn* (h). Such an indorsement, or payment, or acceptance, after the statute had run, would not revive the debt: *Hyde v. Johnson* (i). Nor can any of the executors or devisees be affected by not interfering in the business of the surviving partners after the decease of Sir Richard Bassett, whether they did or did not know that his name was still used in the firm: *Doe d. Smith and Payne v. Webber* (k). The Courts are careful not to interfere between a debtor and creditor, to enlarge the contract of either party: *Cameron v. Smith* (l). The contract of the bank with the debtor, which was joint during the life of all the partners, became, by the death of one of the partners, several, as to his estate: *Slater v. Lawson* (m). The partners have, no doubt, mutual equities.

(a) 2 B. & C. 23.

(b) 1 B. & Adol. 396.

(c) 4 Russ. 431.

(d) 12 Mee. & W. 510.

(e) 7 Beav. 134.

(f) 3 Mont. & Ayr. 232.

(g) 3 Swanst. 490, n.

(h) Ry. & Mo. 416.

(i) 2 Bing. N. C. 776.

(k) 1 Ad. & Ell. 119.

(l) 2 B. & A. 305.

(m) Ubi supra.

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They are entitled to have the accounts of their transactions taken, and the affairs wound up ; and this equity the creditor of any of the partners may insist upon, in order by that means to recover payment of his demand out of the surplus, if there be any, which is due to his debtor from the partnership. Even this equity, whether it be or be not barred by the Statute of Limitations, cannot be prosecuted after long delay: *Tatam v. Williams (a)*. But the bill, in this case, is not framed or directed to the prosecution of any such equity as the argument supposes. It is, in fact, framed upon grounds which expressly exclude the existence of any equity or claim entitling the surviving partners to call for aid from the estate of the deceased: *Ex parte Ruffin (b)*. The form of the note binds the maker to pay at a certain time after "sight." The "sight" necessarily takes place whenever the note is presented to the maker for payment, either of the whole amount thereby made payable, or for payment of part of that amount. It follows, that the "sight" referred must have happened at the first payment of interest upon the note, for the note was then presented by the payee, and the fact of payment of interest indorsed upon it. The presentment or acceptance may be in any form or manner: *Powell v. Monnier (c)*; and the statute would run from the first moment at which the debt was due, and default was made: *Hemp v. Garland (d)*, *Whitehead v. Walker (e)*, *Waters v. Earl of Thanet (f)*. Even treating the payments as admissions in any respect affecting the estate of the deceased partner, they were, at the utmost, admissions by an executor, which could not affect the real estate: *Putnam v. Bates (g)*.

(a) 3 Hare, 347.

(b) 6 Ves. 119.

(c) 1 Atk. 611.

(d) 3 Gale & Dav. 402.

(e) 9 Mee. & W. 506.

(f) 2 Q. B. Rep. 757.

(g) 3 Russ. 188.

It was insisted moreover, on behalf of some of the Defendants, who claimed under a settlement of part of the property, that a creditor of the deceased could not pursue the estate in the hands of a purchaser for valuable consideration: *Richardson v. Horton* (a).

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Mr. Romilly, in reply.—It is impossible for the Court to hold that the estate of a deceased partner may not be affected, or may not be bound by the acts of the surviving partners. The force of the partnership contract renders it inevitable. Take the case of a firm who had contracted to execute a certain work, involving large expenditure, and requiring extensive agencies: one of the partners dies,—still the contract must be performed,—the survivors must go on with it,—they must use the necessary means to complete the undertaking,—and enter into all the subordinate agreements or contracts which the business requires. They may act wisely or imprudently, but still, by the best exercise of their judgment must the estate of the deceased be bound. The subordinate contracts made by the survivors arise out of the pre-existing contract, but they are in fact new contracts, and although they are new contracts yet they are binding even as against the estate of the deceased. Wherein does the distinction consist between the contract to pay a sum of money and interest, and a contract to do anything else? When the performance of the contract, the payment of the money, is required, the surviving partners must exercise their best discretion as to what is fit to be done. It is not suggested, that in this case their discretion was fraudulently, or was not soundly, exercised. They paid the interest, and not the principal of the debt. Can it be disputed, that, in taking the accounts between the partners, the survivors might have taken credit for this pay-

(a) 7 Beav. 112.

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ment,—or that if they had paid the whole debt they might have taken credit for it? And is it not a necessary consequence, that the estate of the deceased partner is bound by the acts of the survivors?—that it is bound not only by what the survivors did, but by the consequences of their not having done what in their discretion they determined not to do. They determined not to pay the debt at that time, but to pay the interest, which was the price of the forbearance of the Plaintiffs to enforce their claim. That contract for forbearance the estate of the deceased partner was a party to, and entitled to the benefit of,—as it would have been entitled to the benefit of the payment, and release of the debt, if the debt had been then paid out of the partnership property. The Plaintiffs are not bound to shew that the payment of the interest instead of the debt was the best course which could have been taken for the benefit of the estate of the deceased. It probably was the best course; but it is sufficient for the Plaintiffs, to shew that it was the course which the surviving partners took, in order to carry into effect the contract of the firm; and that the propriety of the course so taken is not impeached by the representatives of the deceased partner. It has been said also, that the executors could not, by suffering the name of the deceased partner to be continued in the business, render his estate liable; and if it be admitted that they could not, by that means, prejudice their cestui que trust, or the parties beneficially interested under the will of their testator, yet so far as they are themselves beneficially interested in the testator's estate they may be made liable. According to all analogy, in equity, their conduct would be made to affect their own interests in the estate of the party with whose name and credit they so dealt.

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I think the cases of *Atkins v. Tredgold* (a), *Slater v. Lanson* (b), and *Ault v. Goodrich* (c) must govern this case; and that the acts of the surviving partners of the banking firm, as such partners, have not had the effect of keeping the Plaintiff's debt alive against either the real or personal estate of Sir *Richard Bassett*.

The second question made in argument was, whether the acts done by the surviving partners, or rather by the bank, are not to be taken as the acts of the executors, or of one of the executors of Sir *Richard Bassett*, one of such executors being a partner in the banking firm. My opinion is, that, with respect to the acts of the surviving partners, they were such as the surviving partners in that character were bound and might have been compelled to do, and consequently that they are not acts which I can treat as acts of the executors of Sir *Richard Bassett*.

The third question is, whether the Plaintiffs could enforce their debt against Sir *Richard Bassett's* estate, by reason of the equities between the surviving partners and his estate; and this depends, in the first instance, upon the form of the pleadings. In order that the Plaintiffs may have such an equity, it is necessary that the accounts of the partnership should be taken, for the Plaintiffs are only entitled to stand in the place of the surviving partners of Sir *Richard Bassett*, against his estate. Now the pleadings appear to me to have been framed not only so as not to raise that question, but to have been anxiously framed for the purpose of

(a) 2 B. & C. 23.

(b) 1 B. & Adol. 396.

(c) 4 Russ. 430.

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shewing that the Plaintiffs are compelled (as they claim, according to the case of *Wilkinson v. Henderson* (a), to be entitled to do,) to pursue directly the separate estate of Sir *Richard Bassett*, and not to seek relief against his estate through his surviving partners. It is, I think, impossible to read the pleadings without seeing that this was advisedly done, with reference to the fact, that, instead of Sir *Richard Bassett* being indebted to his partners, his partners were indebted to him in respect of the partnership dealings. This is an answer to the argument which was founded on the language of Lord *Langdale* in *Braithwaite v. Britain* (b) and of Lord *Cottenham* in *Winter v. Innes* (c).

After a dissolution of partnership by death or otherwise, the surviving or continuing partners of the firm are, (in a suit against them by persons claiming to be creditors of the partnership), entitled to the protection of the Statutes of Limitation, although, as between themselves and retired partners, or the estates of deceased partners, the partnership accounts are unsettled; and the retired partners, or the executors of a deceased partner, are in such a suit against them entitled to the like protection.

If the surviving partners may, as undoubtedly they may, both in law and equity, plead the statute of limitations in bar of the claim of a creditor of the firm, and that whether the partnership accounts have or have not been settled between themselves and a retired partner, or the estate of a deceased partner, it appears to me impossible to contend with success that the estate of a deceased partner should not be entitled to the same defence only because the partnership accounts have not been taken. If I were to go the whole length of the Plaintiff's argument upon this point, it would follow, that the statute of limitations never could be pleaded in bar to a debt claimed to be owing from a dissolved partnership, so long as the partnership accounts remained unsettled. I am satisfied that neither Lord *Langdale* nor Lord *Cottenham* intended to decide any such abstract proposition as that for which the plaintiffs have contended.

The only other question is the form of the note, and

(a) 1 Myl. & K. 582.

(b) 1 Keen, 206.

(c) 4 Myl. & Cr. 101.

the manner in which the parties have acted with reference to it. If the payment of the interest upon the note had been in conformity with the rights of the parties, it is impossible that I could consider the note as not having been presented for sight long before the death of Sir *Richard Bassett*. But it was said, that it was apparent that the payment of interest was not according to the tenor of the note, and that I must therefore assume that such payment had been made in consideration of the note not having been presented, and in pursuance of an agreement to that effect. No such agreement has been suggested on the pleadings, and the statements in the pleadings appear to exclude that suggestion. [His Honor read the statements in the bill to the effect that the interest on the 400*l.* and on the two promissory notes was from time to time duly paid by the firm of Sir *Richard Bassett, Roe and Blachford*, and was duly received by *David Way*, and by the Plaintiffs up to the 31st of December 1842.] This is an allegation that the parties acting upon the receipt and upon the notes have duly and regularly paid interest upon them. I think the statute of limitations which has been pleaded is an answer to the claim made in this case.

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Bill dismissed with costs.

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Devise and bequest of residuary real and personal estate to trustees, upon trust, with all convenient speed to sell the real estate, and such part of the personal estate as was in its nature saleable, but the mode and time of sale and of settling and adjusting accounts and of requiring payment of what should be due to the testator to be left entirely to the discretion of the trustees, and until such sale and the final adjustment of his co-partnership accounts, therents and income of the real and personal estate remaining unsold, and the interest on any debt or debts owing to

JOHN MACKIE, by his will, dated in November, 1838, after giving certain legacies, devised and bequeathed his real estate, and the residue of his personal estate, to *W. Mackie* and *H. G. Williams*, their heirs, executors, administrators, and assigns, respectively, upon trust, with all convenient speed, absolutely to sell and dispose of his said real estate, and such part of his said personal estate as was saleable in its nature, either by public auction or private contract; and directed that the time and mode of sale should be entirely left to the discretion of his trustees or trustee for the time being. And he directed his trustees or trustee for the time being to call in and require payment of all such debt and debts, sum and sums of money as should be due or owing to him at the time of his decease, and also to proceed to settle and adjust all outstanding accounts of his mercantile house or firm, and get in and receive all such sum and sums of money as should upon such settlement appear to be due to him. And the testator further declared that the time and mode of settling and adjusting such accounts, and requiring payment of what should thereupon appear to be due and owing to him, should be left entirely to

the testator, to be paid to the same persons and in the manner directed with respect to the income of the estate when invested. The testator gave the produce of his real and personal estate to his two daughters for their lives, with remainder over; and he recommended each of his two daughters to pay 25*l.* a year out of her moiety of the income of his estate for the education and maintenance of his nephew, until the nephew attained twenty-one years:—

Held, that (there being no improper delay in the conversion of the estate) the daughters of the testator, as tenants for life, were entitled to the income actually produced by the residuary estate during the interval before the sale or realization of the whole of such estate, and the investment thereof according to the directions in the will; but that they were not entitled, during that interval, to any interest upon such parts of the residuary property, or on the value of such parts thereof as were unproductive.

That the two sums of 25*l.* were only to be allowed by the daughters to the nephew yearly out of their income during their lives, and that such sums did not constitute a charge upon the life interests of the daughters for the whole period of the minority of the nephew.

the discretion of his trustees or trustee for the time being; and that the produce of any such sale or sales as aforesaid, and all other sum or sums of money, to be received by his said executors and trustees for or in respect of any such debt or debts, or arising from his share and interest in the business then carried on by him in co-partnership with the said *H. G. Williams*, and all other his personal estate when converted into money, should from time to time be invested by his trustees or trustee for the time being, in their or his names or name, upon Government or real securities as therein mentioned, as the trustees or trustee for the time being might think advisable, with full power to vary such investment from time to time as they or he should think proper. And the testator declared that his trustees or trustee for the time being should be possessed of the said stocks, funds, and securities, and the interest, dividends, and income thereof, upon the trusts thereafter declared. And the testator directed that until such sale or sales respectively, and the receipt of such debt or debts respectively, and the final settlement and adjustment of his co-partnership accounts, the rents and income of his said real and personal estate respectively remaining unsold, which should accrue due after his decease, and also the interest which should be received in respect of any such debt or debts owing to him as aforesaid, or in respect of his capital invested in his said partnership business, should be paid to the same persons, and applied in such and the same manner as was thereafter provided with respect to the dividends, interest, and annual income of his said real and personal estate, after such investment thereof as thereinbefore mentioned. And the testator directed his trustees or trustee for the time being to stand possessed of the produce of his said real and personal estate and effects: as to one moiety thereof, in trust to pay the annual produce thereof unto

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his daughter *Flora West Mackie* during her life; and after her decease, upon trust for her children as therein mentioned. And as to the remaining moiety thereof, in trust to pay the annual produce thereof unto his daughter *Ann Simpson Mackie*, during her life, and after her decease upon similar trusts for the benefit of her children. And the testator directed, that, in case either of his said daughters should die without having any child who should attain a vested interest in the moiety thereinbefore bequeathed to or in trust for such daughter, such moiety should be held upon the trusts declared respecting the other moiety. And in case both of his said daughters should die without having any child who should attain a vested interest in the produce of his said real and personal estate, then the same should remain and be in trust for the person or persons who under or by virtue of the statute made for the distribution of the estates of intestates would then be entitled thereto in case he (the testator) had died intestate. And the testator appointed *W. Mackie* and *H. G. Williams*, executors of his will; and he added "I recommend to each of my said daughters to pay and allow by brother *W. Mackie* the sum of 25*l.* per annum out of her moiety of the income of my estate, to be employed by him in the maintenance and education of my nephew *William Lewis Mackie*, in such manner as my said brother shall think proper, until my said nephew shall attain the age of twenty-one years. I earnestly and strongly recommend and counsel my said daughters to settle and assure my property to which they are or may become entitled, either under or by virtue of the settlement made on my marriage or otherwise (but nevertheless at their own discretion, and with full and free permission and liberty to act therein as they may think fit), upon similar trusts to those which are herein declared concerning the residue of my real and personal estate.

The testator died in January, 1839. The executors, in April following, filed the bill against the testator's daughters, *Flora West Mackie* and *Ann Simpson*, at that time infants and unmarried, and also against *William Lewis Mackie*, the nephew, to obtain the direction of the Court in the administration of the estate. *Flora West Mackie* attained her age of twenty-one years, and died in 1840, having by her will bequeathed the whole of her property to her sister *Ann Simpson Mackie*, whom she appointed her executrix. *Ann Simpson Mackie* attained her age of twenty-one, and died in 1842, having by her will given the whole of her property to her executrix *Eliza Laing*. A supplemental bill was filed against *Eliza Laing* and her husband, and the parties who, at the death of the last survivor of the two daughters, would have been entitled under the statute of distributions to the testator's estate if he had died intestate.

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It appeared by the Master's report that the residue of the testator's estate consisted of a sum of 935*l.* in the hands of the executors; a debt of 6241*l.*, due to the estate, as the testator's share of a partnership which he had carried on with *H. G. Williams*, one of the plaintiffs; a sum of 4812*l.* Consols, standing in the names of the executors; a lease of certain premises for twenty-one years, determinable at the option of the lessee at the end of the first seven or fourteen years, at a rent of 120*l.*; and a reversionary interest in a moiety of a sum of 5000*l.* Consols, expectant on the decease of *Mrs. Thomas*, a lady of very advanced years. The Master found that it would not be for the benefit of the estate that the reversionary interest in the moiety of the 5000*l.* Consols should be sold. The two annual sums of 25*l.* each had been paid to the testator's brother *W. Mackie*, for the benefit of the nephew *William Lewis Mackie*, until the death of the last survivor of the

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testator's daughters; and the Master found that the arrears of such sums from that time, *William Lewis Mackie* being still an infant, amounted to 129l. 2s. 5d. On further directions, *William Lewis Mackie* presented his petition for the payment of the 129l. 2s. 5d. to his father, for his benefit; and Mrs. *Laing* and her husband applied for payment to them of what should be found due to the estate of *Ann Simpson Mackie*, in respect of the life interest of the testator's daughters in the residue. At the hearing for further directions—

Argument.

Mr. *Lloyd*, for the Plaintiffs.

Mr. *Tinney*, and Mr. *Toller*, for the executrix and residuary legatee of *Ann Simpson Mackie*.

Mr. *Wilcock* and Mr. *Taylor*, for the next of kin of the testator.

The questions were, first, whether the tenants for life were, under the terms of the will, entitled to receive the income of the residuary estate in specie, in the interval before its conversion into permanent investments by the trustees; or secondly, whether they were entitled during that time to no more than would have been produced if the fund had been laid out in permanent investments; or thirdly, whether, if the tenants for life were entitled to the income of the residuary estate in specie, they were entitled to require that a valuation should be made of the property which produced no actual income during that interval, or a part of that interval, in order that an income from that source, equal to what the property so valued would have produced if in a state of permanent investment, might be given to the tenants for life. On this point the cases cited were

those referred to in 2 *Roper on Legacies*, pp. 302 et seq., ed. 3.

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The other question was, whether the testator's nephew *W. L. Mackie* was entitled to have paid to him, out of what should be found due in respect of the daughter's life interests, or so far as that would extend, two annual sums of 25*l.* each during his minority; or whether those sums were to be considered only as an allowance to be made to him by the daughters, year by year, out of the income of each year as they received it, and to cease at their deaths.

VICE-CHANCELLOR:—

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Judgment.

I should have no doubt as to the question which has been argued between the representative of the tenants for life, and the parties entitled in remainder, with regard to the income of the residue during the lifetime of the tenants for life, if the case stood unaffected by the clause in this will relating to the power given to the trustees to postpone the sale or realization of the property until such time as they should think fit, and the clause which directs what is to be done until the investment shall have been made according to the trusts of the will. Where a general residue is given to a person for life with remainders over, and there is nothing more to guide the judgment of the Court, the Court does not (as a matter of course) permit the tenant for life to receive the interest produced by any part of such residue (except such part, if any, as may at the time of the testator's death be in a certain state of investment), but converts the residue into securities of a permanent nature, and gives the tenant for life the income derived from such securities.

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In such cases, the tenant for life, being deprived of the actual income produced by the residue, it becomes necessary, in order that the amount of the income which the Court substitutes for it may be ascertained, that the amount of the residue itself should be ascertained by actual conversion, valuation, or otherwise. And accordingly the Court, as a general rule, fixes a time applicable alike to all cases at which the value of so much of the property, as shall not then be in that state of investment which the Court requires, shall be ascertained. But when (as in the present case) the testator himself directs, that, until his property shall be actually converted, the tenant for life shall receive the actual income of his property in specie as it stood at his death, the rule referred to has no application; the Court, in such a case, has only to see that the property is converted without improper delay; and it executes the declared intention of the testator in allowing the tenant for life to receive the income of the property until such conversion. This argument is fortified in the present case by adverting to the state of the testator's property—for example, his partnership property—at the date of his will.

It was said, however, that the Court at all events should convert, or treat as converted, at the end of a year from the testator's death, so much of his property as was then and has since been unproductive. But if I am right in the conclusion I have come to, as to the general estate, I cannot apply different rules to different parts of the property, according as it may be more or less productive, from the accidental profits of trade, from dividends, or from other circumstances. The non-conversion of one part of the property is beneficial to the tenant for life; the non-conversion of another part is beneficial to the remainderman. I must presume that the testator made his will and allowed it to speak at his

death with reference to his knowledge of the state of his property. In modern cases, circumstances apparently trifling have been held sufficient to entitle a tenant for life to the enjoyment, in specie, of the residue for his life; and in this case there is no reason why I should refuse to follow the words of the testator's will, until his property is actually converted, provided such conversion is not improperly delayed. I give no opinion as to what the decree in this case would have been, if improper delay had been a point in the cause. The cases of *Sitwell v. Bernard*, and the other cases in 2 *Roper*, p. 301 (a), are the converse of this case.

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 —
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The question which remains is, as to the allowance to the nephew. The words of the will are capable of the construction contended for by Mr. *Lloyd*, and also of that contended for on the other side, and the question is, which of the two constructions is to be adopted. If the effect of the will be, that the testator has created a charge upon the life income of each of the daughters, to the amount of 25*l.* a-year in favor of the nephew, it is clear that the charge will override all that they take, whether annually or not. If, on the other hand, the intention be that the daughters, out of what they annually receive, shall each make an annual allowance to the nephew of 25*l.*, then a different rule is applicable. I have looked at the case with the view of determining whether the will affords evidence of any paramount intention that the nephew should at all events have two annuities of 25*l.* each, during his minority: it is clear that the testator had no such paramount intention; for the daughters might in the first place have died before any part of the residue became payable, and secondly, the daughters if they had lived, might not have receiv-

(a) *Treatise on Legacies*, ed. 3.

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Judgment.

ed enough to provide for the payment of 25*l.* each a-year, until the nephew attained his majority; and in neither of those cases is there any charge upon the residue, that is, upon those who are less the objects of the testator's bounty than his daughters, so as to secure the continuance of the annuities of 25*l.* during the minority of the nephew. It is clear, therefore, that there is no paramount intention that he should at all events receive those annual sums. It is impossible to doubt that the daughters were more the objects of the testator's bounty than the nephew or those entitled in remainder; yet, according to the limitations in the will, the nephew is to have no provision made out of the remainder. As I have said before, the will is clearly capable of both interpretations, and I cannot carry the conjecture or inference which I have made beyond reasonable limits. It appears to me the plain intention is, that the daughters, out of what they receive, are to make an allowance to the nephew, and to retain the surplus for themselves. It is impossible to read the will without seeing that when the testator speaks of the sum to be allowed by the daughters of 25*l.* a-year each, out of their moieties of the income, he speaks of income which from time to time is to come to them, and out of which they are to make the payment. This is not therefore a charge upon the moiety of the income to be raised by the daughters during the minority of the nephew, if they receive enough: it is nothing more than an allowance to be made to him in every year out of what would otherwise be their available income. I am very far from saying that this is clear; but I think it is the sound as well as the natural construction of the words of the will.

1846.

Jan. 21st,
22nd, 23rd,
and 28th.
Feb. 16th.

MORSE v. TUCKER.

JOHN OWEN EDWARDES, by indenture, dated in January, 1783, demised a farm in the county of *Pembroke*, to *Morris Adams*, his heirs and assigns, for the lives of three persons therein named, and the life of the survivor of them. The lease contained a covenant by *John Owen Edwardes*, for himself, his heirs, executors, administrators, and assigns, with *Morris Adams*, his heirs and assigns, that, by, under, and subject to the rents, covenants, and agreements therein contained, he, *Morris Adams*, his heirs and assigns, should peaceably have, hold, occupy, possess, and enjoy the said premises, for and during the term thereby granted and demised, without molestation or interruption by *John Owen Edwardes*, his heirs or assigns, or any other person or persons lawfully claiming, or to claim, any right or interest from, by, or under him or them, or any or either of them.

A lessor covenanted with his lessee for quiet enjoyment of the demised premises, and afterwards devised his real estate, subject to and charged with the payment of his debts. After the death of the lessor, the lessee was evicted, and brought his action of covenant against the executors of the lessor, who pleaded plene administravit; whereupon the lessee took out judgment of assets quando &c., and procured the damages to be assessed upon a writ of inquiry. He then filed his bill against the devisees of the lessor, for satisfaction of the damages

J. O. Edwardes died in 1825, having, by his will, devised all his unsettled real estate to his wife, *Catherine Edwardes*, for her life, subject to and charged with the

and costs out of the real estate of the lessor, devised by his will.

Held, that, although damages recovered in an action of covenant, brought in respect of breaches of covenant happening after the death of the testator, were not a debt within the statute of fraudulent devises, (3 & 4 Will. & M. c. 14), yet they were a debt payable out of the real estate of the testator, under the charge of debts thereon created by his will.

That the devisees were not bound by the action brought, or the inquiry as to damages had against the executors, but were entitled to have the question of the liability of the estate of the testator on the covenant tried in an action defended by the devisees themselves.

The lessee having recovered damages upon the covenant in the action directed by the Court, to which the devisees were parties, was held entitled, as against the devisees, to the amount of such damages,—to his costs of the ejectment,—of the action brought against the executors,—of the action on the covenant to which the devisees were parties,—and of the suit, and also to interest on the damages and costs, to be computed from the time the amount was ascertained and judgment entered up in the action to which the devisees were parties.

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 —
 Statement.

payment of his just debts; and, after her decease, he devised the same unto his three daughters, *Anna Maria*, *Charlotte*, and *Jane*, and their respective heirs as tenants in common. And the testator bequeathed his personal estate to his wife, and appointed her sole executrix of his will. *Catherine Edwardes*, the widow, died in 1826, having, by her will, appointed *Thomas Edwardes Tucker*, and her three daughters, *Anna Maria*, *Charlotte*, and *Jane*, her executor and executrices.

The lease of January, 1783, had become vested in *Thomas Morse* and *Jane* his wife. In 1827, *William Edwardes Tucker*, the eldest son of *John Owen Edwardes*, who was entitled as tenant in tail, under a settlement made on the marriage of *John Owen Edwardes*, to the reversion of the lands comprised in the lease, brought ejectment against *Morse* to recover the demised lands, on the ground that the lease was not a due exercise of the power of leasing given to *John Owen Edwardes* by the settlement. The Court held that the lease was not authorized by the terms of the power, and *Morse* was evicted (a).

In December, 1836, *Morse* brought his action of covenant against the executors of *John Owen Edwardes* for the damages of his eviction. The Defendants pleaded plene administravit, and the Plaintiff, *Morse*, took judgment of assests quando &c., and executed a writ of inquiry, in which the damages he sustained by his eviction from the farm were assessed by the jury at 2194*l.*, and with the costs amounted to 2277*l.* *Morse* then filed his bill against the executors and devisees of *John Owen Edwardes*, for payment of the damages and costs

(a) See the report of the case *and J. Symmons v. Morse*, 2 Doe d. *Harries*, *W. J. Tucker*, Cr. & Mee, 247.

out of the personal estate; and if that should be insufficient, to have the same raised and paid out of the real estate of *John Owen Edwardes*, devised by his will.

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 —
Statement.

The case came on to be heard before the Lord Chancellor in July, 1841, when it was ordered to stand over, that a personal representative of *Morris Adams*, the original lessee, might be made a party. Letters of administration of the estate of *Morris Adams* were afterwards obtained, and the administrator was brought before the Court by supplemental bill. The cause came again to be heard in May, 1845, when liberty was given to the personal representative of *Morris Adams* to bring an action upon the covenant against the personal representatives of *John Owen Edwardes*; and the devisees of the real estate of *John Owen Edwardes* were to be at liberty to defend the action in the names of the personal representatives. Certain admissions were directed to be made on both sides, and it was ordered that no evidence of damage should be given except evidence of the value of the lease at the time of the notice to quit, in September, 1831, and evidence of the value of the crops on the ground, if any, at the time of the execution of the writ of possession; and the judgment was to be dealt with as the Court should direct, both as to damages and costs. The action was tried, and judgment recovered by the representative of the lessee, for 1465*l.* 15*s.* damages. The case came on for further directions.

Mr. *Tinney* and Mr. *Stinton*, for the Plaintiffs.

Argument.

Mr. *Romilly*, Mr. *Pitman*, and Mr. *Bevir*, for the Defendants.

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The arguments and authorities cited are all mentioned and considered in the judgment.

Jan. 28th.
Judgment.

The VICE-CHANCELLOR, (after stating the proceedings which had been had in the cause):—

The Plaintiff claims, first, the amount of the damages, and the costs of the action which has lately been brought under the direction of the Court. To these damages he insists he has a right to add the costs of the ejectment of 1833, which are made up of two parts: the costs paid by him to the defendant, which amount to 109*l.* 14*s.* 6*d.*; and, secondly, his own costs, to be taxed. He then seeks to add to the amount of damages the costs sustained by him in the action for meane profits, which require the same subdivision as the others; namely, the costs paid by the Defendant in the action to the Plaintiff in the action, and the costs of the Defendant, to be taxed. The Plaintiff seeks to add also the costs of the action of covenant against the executors; and he claims interest upon the aggregate amount of those sums in this court. Lastly, he claims to be paid the costs in equity of the suit to recover the debt, and also the costs of the cross suit. The Plaintiff puts his claim in a two-fold way: first, he claims payment of his demand as a debt within the meaning of the charge in the will; and if not entitled to that, then he claims a right to marshal the assets of *John Owen Edwardes*, so as to take out of the real estate whatever amount of the personal estate has been applied in payment of debts to the payment of which the real estate was unquestionably liable. The Defendants, the devisees of the real estate, insist that the claim in question is not a debt within the meaning of the will, and they deny the right of the Plaintiff to

marshal the assets, under circumstances which I shall not at this moment refer to. If that point be also decided against them, then the Defendants resist the claim which is made of interest and costs.

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MORAN
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—
Judgment.

The principal question is, whether damages for a covenant broken after the death of the testator is a debt of the testator within the meaning of the word "debt," as used in the will. Upon that question, the Plaintiff relied upon the cases of *The Earl of Bath v. The Earl of Bradford* (a) and *Lomas v. Wright* (b).

The authorities cited on behalf of the devisees were *Wilson v. Knubley* (c) and *Jenkins v. Briant* (d). In *Wilson v. Knubley*, it was decided that the devisees of the real estate of the covenantor was not liable in covenant in respect of a covenant entered into by the deviser for title, or for quiet enjoyment, and of which covenant there was a breach after his death. The ground on which that decision rested was, that the remedy given by the Statute of Fraudulent Devises (e) was an action for debt only, and that, unless an action of debt would lie, the statute was inapplicable. The case did not, however, necessarily decide, that every case in which an action of debt would lie would be within the statute. That question arose in the case of *Farley v. Briant* (f). There a surety entered into a covenant for the payment of rent of an ascertained amount by the principal. No breach of the covenant occurred during the life of the surety, but after his death the rent was unpaid; and it was held that the devisees of the surety were not liable for the amount. The Court, in giving

(a) 2 Ves. 587.

(b) 2 Myl. & K. 769.

(c) 7 East, 128.

(d) 6 Sim. 603.

(e) Stat. 3 & 4 Will. & M.

c. 14.

(f) 3 Adol. & E. 839; S. C.

5 Nev. & Man. 42.

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 }
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judgment, said, that an action of debt would lie, because the amount due, though damages, was liquidated. The decision proceeded upon the ground, that, in order to bring the case within the statute, the relation of debtor and creditor must actually subsist between the parties in the lifetime of both. In *Jenkins v. Briant* (a), the testator himself granted an annuity, and bound himself by covenant to pay it. The annuity was regularly paid, —and consequently there was no breach of the covenant—during the life of the grantor, but it fell into arrear after his death; and the *Vice-Chancellor of England* held, that the real estate in the hands of the devisees was liable. Upon the cases of *Wilson v. Knubley* and *Farley v. Briant* being cited, the *Vice-Chancellor* said, “The reason of the decision in *Wilson v. Knubley* was, that the stat. 3 & 4 Will. & M. c. 14, in the 3rd section, speaks of an action of debt. There the covenant was contingent, and unascertained damages only could be recovered for a breach of it. Here the covenants are absolute, and the sums to be recovered are certain:” and he held, in that case, that the devisees were liable. The purpose for which the above cases were cited, as I understand it, was to shew that the word “debt” has a strict legal acceptation, and upon that to found the argument, that the debts, which, by the will, are charged on the real estate, cannot include the claim in question, that it was not, in fact, a debt at the death of the testator. If upon this point I am not bound by authority, I should strongly incline against that construction of the will, which would exclude the claim in question. I do not agree in the observation made at the bar, that claims such as these are, in a moral point of view, distinguishable from debts due at the death of the testator. If a person sells an estate for its full value, and, in considera-

(a) 6 Sim. 603.

tion of that value being paid to him by the purchaser, by covenant guarantees the title, I cannot agree that such vendor is justified in enriching his personal estate at the expense of the purchaser, and afterwards disposing of his property by will, so as to make his guarantee valueless, though the title to the property should turn out good for nothing. The statute conferred a bounty upon some creditors, without altering the rights of other persons, except those who claimed as volunteers; but I am asked to put a construction on this will, which supposes the testator himself to have done justice to one set of claimants, and to have intended to prefer his devisees to another class of claimants, namely, those who otherwise might have resorted to the real estate by descent for payment of their demand; for, unquestionably, the estates charged would, in the hands of the heir, have been assets by descent, and, as such, liable to the demand in question.

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 MONSE
 v.
 TUCKER.
 Judgment.

If, however, the effect of the case of *Farley v. Briant* has been to give to the word "debt" a definite legal meaning, not for the purposes of the statute only, but for all purposes, I might (in the absence of authority) be bound by it, for I know nothing of the testator's intention, except by the words which he has used in his will. I am glad, however, to find that the case is ruled by authority. The decree in *The Earl of Bath v. The Earl of Bradford* decided the question. The authority of that case is certainly less, inasmuch as the point does not appear to have been there taken in argument; which may be accounted for by the fact, that it was not until about fifty years afterwards, when *Wilson v. Knubley* was decided, that the statute received its present construction (a). The case of *Lomas v. Wright*, however,

(a) The Registrar's book was, during the argument, searched on behalf of the Plaintiffs for entries relating to the case of the *Earl of Bath v. Earl of Bradford*, and it appeared that

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—
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in which *Wilson v. Knubley* was cited, appears to me to be a decision in point. The plaintiff in that case, as in this, claimed damages under a covenant for quiet enjoyment: the covenant was broken nine years after the testator's death. The testator in that case had estates in the county of *Leicester*, which were subject to a mortgage: he had other estates in the counties of *Cheshire* and *Lancaster*, and, by his will, after directing his debts to be paid out of his estates, he devised his *Cheshire* and *Lancashire* estates to trustees to sell, and out of the proceeds to pay his debts (including mortgage debts) and legacies; and then he devised his estates in *Leicestershire* to trustees for his son *John* and his issue, in strict settlement. The personal estate being insufficient for payment of the debts, the proceeds of the estates in *Cheshire* and *Lancashire* were applied in paying the debts, including the mortgage debts. The plaintiffs in that case contended, first, that they had a right under the particular clause in the will to be considered as legatees, and as such entitled to stand in the place of the mortgagees, who had resorted to the only fund available to the legatees; but, secondly, they contended that they were creditors entitled to be paid out of the real estates. Sir *John Leach* said, "It is unnecessary to consider the questions which were raised on the supposition that the plaintiffs were entitled to claim as legatees; because I am of opinion, that, under the covenants contained in the settlement, the plaintiffs are to be considered as creditors. * * * As against the devisees of the testator, they are entitled to stand in the place of mortgagees who have been satisfied out of the fund provided for the payment of debts" (a). These

the liability of the real estate to the debts generally, including the judgments against the executors, was, upon the pleadings, founded upon the charge in the will.
(a) 2 Myl. & K. 775.

were the facts upon which the point was decided. The *Leicestershire* estates, having been devised, were thereby withdrawn from the liability to the plaintiffs in covenant. According to the case of *Wilson v. Knubley*, the right of such creditors to come against the *Cheshire* and *Lancashire* estates depended, therefore, wholly on the will. The judgment decided, against the devisees, that if the mortgagees, who had two funds to resort to, exhausted the plaintiffs' only fund, the plaintiffs might resort to the fund open to the mortgagees. I think, therefore, that the case of *Lomas v. Wright* binds me, and that I must hold that this is a claim to which the devisees of the real estate are liable.

1846.
MORSE
v.
TUCKER.
—
Judgment.

With regard to the amount to be added,—excluding the interest,—the Plaintiffs are clearly entitled to recover, first, the 1465l. 15s. and costs; secondly, the costs of the ejectment paid to the Plaintiff at law, and the taxed costs of the Plaintiffs in equity,—the same in the action for mesne profits, the defence having been confined to the investigation of the amount, which, of course, they could not resist. They will also be entitled to their costs of the action of covenant against the executors; and as I restrained the parties from going into evidence on that portion of the damages which they had sustained, I think, for the purposes of the remaining question, that of interest, I must consider them as added to the debt, though I do not know that it will make any difference in the view which I take of the question of interest.

Upon the question of interest, the cases of *The Earl of Bath v. The Earl of Bradford* and *Hyde v. Price* (a) were referred to. In the former case, an action had

(a) 8 Sim. 578.

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—
Judgment.

been brought and judgment was recovered, and upon that the bill was filed to have the ascertained amount paid. They were judgment debts before the statute which entitled parties to have interest upon judgments; and there the question arose, whether they were entitled to interest against the devised estate; and Lord *Hardwicke* gave interest: but it is material to observe, that that case is distinguishable from the case before me, because they were ascertained amounts. It is not necessary to go into the case before Lord *Hardwicke*, but certainly the practice of the Court has not been in accordance with what Lord *Hardwicke* appears to have stated there. Lord *Hardwicke's* reasoning, as I understand it, appears to be this: he says the real estate is charged with the payment of the debts, and if, therefore, the amount had been raised by the trustees, (and they might lawfully have raised the money), it is clear that it must have carried interest as against the estate, and the owner of the estate must have paid it; and he says, if the money amount to more than the debt, the Court does not put the estate in a worse position, by giving interest on the debt, than it would have been in if the trustees had raised the money, and had paid interest upon it. It would, I suppose, follow from that reasoning, that, when the debt is ascertained, (if there were a devise to pay debts), the Court will give interest upon the debt from the beginning; but if that were so, the question which was argued with regard to interest in this case would not have arisen. I think the general proposition may be stated to be, that a devise to pay debts does not enhance the amount of the demand, or entitle the party to interest independently of the devise, but, leaving the amount unaffected, it provides a new fund for payment of the debts. The question, then, is, how am I to apply that to the present case? Now, as against the devisees, I certainly cannot consider the amount of the demand as

having been liquidated until the last judgment was recovered. More was claimed than has been established. It was that judgment which for the first time ascertained the amount of the damages, and there could be no legal demand for interest under the statute until judgment was recovered. The judgment against the devisees is the judgment from which they must entitle themselves, under the statute of the Queen (a); and, therefore, I think I cannot give more than interest upon that judgment.

1846.
MORSE
v.
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—
Judgment.

DECLARE, that the will of *John Owen Edwardes*, the testator &c., being admitted by the Defendant *William Edwardes Tucker*, the said testator's heir-at-law, ought to be established, and the trusts thereof performed. It appearing that the personal estate of the testator was exhausted in the payment of his funeral and testamentary expenses and debts, and it being admitted that no further personal estate has been received, declare that the Plaintiffs *Thomas Morse* and *Jane* his wife are entitled to have the loss sustained by them from the breach of the covenant for quiet enjoyment contained in the lease of the 20th January, 1783, made good out of the real estate of the said testator, which passed by his will under the charge in the said will contained for payment of the said testator's debts. Let the sum of 111*l.* 14*s.* 6*d.*, the taxed costs of the action of ejectment, paid by the Plaintiff *Thomas Morse* to the lessors of the Plaintiff in the said action, and also the costs of the said *Thomas Morse* in defending the said action, (to be taxed as between attorney and client), when the same shall have been taxed; and also the sum of 40*l.* 10*s.*, taxed costs paid by the said *Thomas Morse* to the Plaintiff at law in the said action for mesne profits; and also the costs of the said *Thomas Morse* in defending the said action, (to be taxed as between attorney and client) when the same shall have been taxed; and also the sum of 83*l.*, the taxed costs at law, as between party and party, of the said *Thomas Morse* in the said action of covenant brought by him against the Defendants, the personal representatives of the said testator; and also the further costs of the said *Thomas Morse*, when the same shall have been taxed; and also the sum of 1465*l.* 15*s.*, the amount recovered in the said

Decree.

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 v.
 TUCKER.
 —
 Decree.

action brought under the direction of this Court by the order of the 7th day of May, 1845, made in these causes, and for which judgment was entered up on the 13th day of January, 1846; and also the costs at law of the said *Thomas Morse* and *Jane* his wife in the same action, when taxed; and also interest at 4l. per cent. on the said several sums, and the amount of the said costs when ascertained, to be computed from the said 13th day of January, 1846, be made good out of the sum of 3,058l. 0s. 6d., 3l. per cent. Consols, in court in trust in this cause to the account of the produce of the sale of the *Llanmiloe* estate, as representing a part of such real estate, and, if necessary, out of the remainder of the said devised estates remaining unsold, and out of the rents and profits of the said devised estates, and by sale or mortgage of the same estates, or a competent part thereof. Refer it to the Taxing Master to tax the costs of the Plaintiffs *Thomas Morse* and *Jane* his wife of the original suit, and of the suit by bill of revivor and supplement, and of the last supplemental suit, and of the cross suit; and also their charges and expenses of obtaining the letters of administration to the said *Morris Adams*; and let the same be paid and made good out of the same fund, or by sale or mortgage as aforesaid, and out of the rents and profits as aforesaid. Tax the costs of the Defendant *William Edwardes Tucker* the heir-at-law of the said testator, and the costs of the said *Thomas Edwardes Tucker*, one of the personal representatives of the said testator, and of his deceased executrix *Catherine Edwardes*, of these suits; and let the same be paid by the Plaintiffs, and be added to their costs. Let the Master ascertain the total amount of all the said sums and interest and costs; and let the same several sums and interest, to be computed by the Master as aforesaid, and the said costs, be paid out of the said sum of 3058l. 0s. 6d., 3l. per cent. Consols, so far as the same will extend; and let the said sum of 3058l. 0s. 6d., 3l. per cent. Consols be sold &c.; and let a sufficient part of the produce of such sale be applied in payment of what shall be so found due by the said Master as aforesaid; and let the same be paid to the Plaintiff *Thomas Morse*, and the residue thereof, if any, be paid to the said Defendants, (the daughters of the testator, the devisees of his unsettled real estate); but if the produce of the sale of the said stock shall not be sufficient for payment of what shall be found due by the said Master as aforesaid, let the whole of the proceeds of the said stock be applied in part payment thereof; and, in case of deficiency, let the Plaintiffs be at liberty to apply to this Court to have such deficiency made good out of the devised estates of the said testator, and, if necessary, out of the past rents and profits of the said devised estates, received, or which shall have been received, by the said Defendants, or any of them, or by their order, or for any or either of their use.

1845.

July 25th.

GREAT WESTERN RAILWAY COMPANY
v. CRIPPS.

MR. ROMILLY and *Mr. Osborne* applied *ex parte*, on behalf of the Plaintiffs, for an injunction to restrain certain of the Defendants, assignees of two persons named *Oldham*, from taking out a sum of 4000*l.*, which the Plaintiffs had paid into court in an action at law brought against them by the same Defendants. The Plaintiffs had contracted with *Messrs. Oldham* for the execution of works on the railway, and under this contract they acquired certain claims against the Plaintiffs. *Messrs. Oldham* became bankrupt. It was alleged that they had assigned to the Defendant *Cripps*, the monies due to them from the Company; but this was disputed by the Defendants, the assignees in the bankruptcy. The assignees brought their action against the Plaintiffs for the monies claimed to be due to the bankrupts; and the Plaintiffs, admitting their liability to the extent of 4000*l.* for the work done, paid that sum into court, not advertent to the fact that the assignees might thereupon stay the action, and withdraw the money paid in, which they accordingly took steps to do.

The Court refused an injunction to restrain plaintiffs in an action at law from taking out of court money which the defendants at law had paid into court in the action, in ignorance that, upon such payment, the plaintiffs at law were entitled to stay their action, and take the sum so paid. Such ignorance or inadvertence does not amount to that kind of mistake against the consequences of which equity will interpose to relieve: *Semble.*

It was urged, in support of the application, that the payment had been clearly made by mistake. The Company could not decide the question between *Cripps* and the assignees, but had only intended to admit their liability to pay a certain sum. The payment to the assignees would be no answer to the demand of *Cripps*, and the Company might be compelled to pay the money a second time.

The VICE-CHANCELLOR said, that, if the payment

Judgment.

1845.
 GREAT WEST-
 ERN RAILWAY
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 Judgment.

into court gave the Defendants at law, the right of taking the money out, he did not see that there was any equity to restrain them. The Company knew the facts of the case: making the payment in ignorance of one of its legal consequences, did not appear to him to amount to such a mistake as called for the interference of a court of equity, if the act were binding at law.

At the request of counsel, leave was given to serve the Defendants with notice of the motion; but it was not afterwards mentioned.

See *Parks v. Earl of Shrewsbury*, 13 Pri. 289.

Nov. 13th.

DUGDALE v. JOHNSON.

A motion which has been opened cannot be afterwards treated by the party moving as an abandoned motion; but the parties opposing are entitled to costs as on a motion refused.

MR. PARRY asked for the costs of the motion. The motion had been mentioned, and an objection having been taken, that other parties ought to be served, the matter had not since been mentioned.

Mr. *Follett* said the motion was abandoned (a).

Judgment.

The VICE-CHANCELLOR said, that the motion having been opened, could not be afterwards treated as merely abandoned. The costs must be paid, as on a motion refused.

(a) See General Order, 5th August, 1818; Beav. Ord. Can. 3.

1846.

GRIGG v. STURGIS.

20th & 23rd
February.

IN 1839, *Samuel Smith* mortgaged an estate at *Bungay* to the Plaintiff, to secure 1000*l.* and interest. In March, 1842, *Smith* having applied for the benefit of the act for the Relief of Insolvent Debtors, his estate was, by order of the Court, under 1 & 2 Vict. c. 110, s. 37, vested in the provisional assignee. On the 28th of May, 1845, the Plaintiff's solicitors wrote to the provisional assignee, as follows:—" *Re Samuel Smith*. Our client, Mr. *Thomas Grigg*, the mortgagee of the insolvent's freehold and copyhold estates at *Bungay*, is such mortgagee for the sum of 1000*l.*, together with an arrear of interest. We understand that you are the sole assignee of the insolvent; we therefore have to request that you will send us a draft for 1000*l.* and the interest due. If this is not convenient, please to let us know if you will release to our client the equity of redemption, and we will send a draft release accordingly. We think it right to inform you, that, unless we hear from you immediately, we shall feel it our duty to file a bill of foreclosure. We are, Sirs, yours," &c.

The statute 1 & 2 Vict. c. 110, s. 68, does not make it the duty of a mortgagee, as against the provisional assignee of an insolvent mortgagor, to obtain an order from the commissioners of the Insolvent Debtors' Court for a conveyance of the equity of redemption; and an offer by the provisional assignee to facilitate the proceedings in such an application does not entitle him to his costs in a suit subsequently instituted against him for foreclosure.

Statement.

By a letter, dated the 30th of May, 1845, the provisional assignee replied:—"You are at liberty to apply to this Court for an order for me to join in a conveyance of the property mentioned in your letter of the 28th instant, if you can shew that the equity of redemption is of no value to the creditors (a). Inclosed is a form of

(a) See Stat. 1 & 2 Vict. c. 110, s. 68.

1846.
 GRIGG
 v.
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 —
Statement.

the order you will ask for. I shall be happy to give your agents any further information on their calling here. If the title be otherwise good, you have a cheap mode of getting the interest vested in me through this Court: should you, therefore, be advised to file a bill in equity, I shall be obliged to ask that Court for costs."

The bill of foreclosure was soon afterwards filed; and the Plaintiff's solicitors forwarded the subpoena to the provisional assignee, in a letter, dated the 6th of June; in which they said, "We must decline ascertaining the value of the equity of redemption on your behalf. We are not quite sure that your Court can give us so good a title as the Court of Chancery. At all events, we cannot advise our client to manage the insolvent's estate in the place of his assignee."

The provisional assignee, by his answer, stated, that he had not received any assets of the insolvent, and that he did not believe there were any available for the purpose of paying, and he had therefore been unable to pay the mortgage money: that he was empowered by the act to release the equity of redemption only under the order of the Insolvent Court, and that such order was only to be obtained on the application of the party requiring the conveyance, or of one or more of the creditors. He also stated, by his answer, that he did not claim, and he thereby absolutely disclaimed, all and all manner of estate, right, title, interest, claim, and demand whatsoever, of, in, and to the mortgaged premises, and every part thereof, and the equity of redemption thereof, and every part thereof. The only question was, whether the fact, that the mortgagee had rejected the alternative which had been offered to him by the provisional assignee, in the above correspondence, was a ground for directing, in

the decree of foreclosure, that the costs of the provisional assignee should be paid to him by the plaintiff.

1848.
Giles
v.
Sturges.

Argument.

Mr *Romilly* and Mr. *Steere*, for the Plaintiff, submitted, that the order of the Insolvent Court under the 68th section (a), founded on affidavit as to the value of the equity of redemption, could not, especially if obtained at the instance of the mortgagee himself, be safely relied upon as a title, inasmuch as it would be open to question in equity; but, however that might be, the Defendant was not entitled to require that the Plaintiff should take that course: the provisional assignee had, as against the mortgagee, no rights which the mortgagor could not, by assignment, have conferred; and the mortgagor could only assign such rights as he himself possessed: *Appleby v. Duke* (b), *Cash v. Belcher* (c).

Mr. *Follett*, for the provisional assignee, argued, that the position of the mortgagor before the insolvency was materially different from that of the provisional assignee, with reference to the mortgaged estate. The mortgagor might have conveyed as he thought proper: the provisional assignee could only act under a certain authority and jurisdiction. It was, therefore, not only reasonable, but the obvious consequence of the law which imposed such restrictions upon the assignee, that parties dealing with him in that character must act in conformity with the authority and jurisdiction to which he was subjected. It could not be the intention of the Act to leave the provisional assignee exposed to be made a party to suits of foreclosure at his own cost, while it excluded him

(a) Stat. 1 & 2 Vict. c. 110.

(b) 1 Phill. 272; S.C., 1 Hare, 303.

(c) 1 Hare, 310.

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 v.
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 —
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from any mode of averting such suits. He mentioned, also, *Ablett v. Edwards* (a), and pointed out the distinction between the present case and that of *Appleby v. Duke*.

Feb. 23rd.
 —

VICE-CHANCELLOR:—

Judgment.

The question is not exactly the same as that which occurred in the case of *Appleby v. Duke* (b). There the defendant did not disclaim, but submitted his right to the Court,—a course which left him at liberty to claim, at the hearing, anything he might be entitled to. But in that case the ground I went upon was, that the assignee in insolvency stood precisely in the same situation as the mortgagor; and, unless the mortgagor could entitle himself, by disclaiming, to his costs, I thought that a person claiming under him could not do so: I did not, therefore, consider that the disclaimer made any difference, and I remain of that opinion. It appears to me to be clear, that a party who disclaims—not in the sense, that he had no interest at the time the bill was filed, but only that he chooses, after the suit is instituted, to abandon his rights—cannot, successfully, claim his costs in a suit of this kind. There are, no doubt, cases where the bill is filed against a party, who, admitting the liability, shews that the demand would have been satisfied had it been made before the filing of the bill; and in such cases the Court may give the defendant his costs. That, however, has no application to a case where the defendant is not made a party, in respect of any demand which the plaintiff has against him, but because his presence is necessary to enable the plaintiff to enforce his own right.

(a) Note to *Perkin v. Stafford*, 10 Sim. 563.

(b) 1 Phill. 272; S. C., 1 Hare, 303.

It appears that the mortgagee communicated to the Defendant that he was willing to take either a cheque for the mortgage-money or a release of the equity of redemption. The answer was to the effect, that, if the equity of redemption were of any value, the Defendant could not release it; but that the Plaintiff might, if he could satisfy the Commissioners of the Insolvent Debtors' Court that the equity of redemption was of no value, obtain from them an order to the Defendant to execute a conveyance which would be an indemnity to him. I think that a mortgagee is not bound to take that course as against the provisional assignee: I must therefore make the common decree of foreclosure.

1846.
GRIEGB
v.
STURGIS.
Judgment.

GABRIEL v. STURGIS.

IN August, 1825, by articles of that date, *Elisha Wilson*, for himself and *Sarah* his wife, agreed to sell, and *Thomas Hodgson* agreed to purchase, for the sum of 1430*l.*, certain freehold and copyhold premises, the property of *Elisha Wilson* and *Sarah* his wife, in right of the wife. *Hodgson* soon afterwards entered into possession of the premises, and paid 795*l.* to the vendors towards the purchase-money. In July, 1827, *Hodgson* borrowed money from the Defendant *Benson* and another, upon mortgage of other property, and he deposited with them the agreement of August, 1825, as a collateral security. In September, 1843, *Hodgson* took the benefit of the act for the Relief of Insolvent Debtors.

14th & 18th
February.

The purchaser of a real estate became insolvent after part, but before the whole of the purchase-money was paid, or the conveyance executed. The vendor died, having devised the estate to the Plaintiffs, and appointed one of them his executor. The bill was filed against the provisional assignee of the insolvent, and an equitable

mortgagee by deposit of the agreement for purchase; and it prayed the payment of the residue of the purchase-money by the Defendants, or by sale of the estate. The Plaintiffs did not prove their title as devisees. The Defendants disclaimed:—*Held*, that the Court could not make the decree sought without evidence of the devise; but that, upon payment of the costs of the Defendants, the Court might (the Defendants not opposing) declare the Plaintiffs absolutely entitled to the estate.

1846.
 {
 GABRIEL
 v.
 STURGIS.
 —
Statement.

Elishe Wilson died, leaving *Sarah* his wife surviving. *Sarah* afterwards died, having (as the bill alleged) by her will given and devised to the Plaintiffs her interest in the premises comprised in the contract, and in the purchase-money which remained due, and appointed one of the Plaintiffs her executor. The Plaintiffs filed the bill against *Benson*, (who was the survivor of the two creditors with whom the agreement was deposited), and against the provisional assignee of the insolvent's estate, stating, that the residue of the purchase-money and interest amounted to about 1000*L.*, and far exceeded the value of the lands; and praying an account of what remained due to the Plaintiffs, and, if the same should not be paid by the Defendants, that the premises might be sold, and the proceeds of the sale, and the rents and profits in the meantime, applied towards satisfaction of the Plaintiffs' lien.

The provisional assignee, by his answer, did not admit the Plaintiffs' title, and denied that any application had been made to him (the Defendant) to join in a sale and conveyance of the premises, which sale, he stated, might have been effected under the authority of the Insolvent Court, without the expense of a Chancery suit. He stated, that he never had, or claimed to have, and did not then claim or pretend to have, any right, title, or interest of, in, or to the premises, or any part thereof, or in any of the matters therein mentioned, and he thereby disclaimed all right and title in or to the same and every part thereof.

The Defendant *Benson*, by his answer, stated, that he had been equitable mortgagee of the premises as above stated; and that, from 1838 to 1842, the rents of the premises had been collected by a receiver appointed in a suit which he (*Benson*) and his co-mortgagee had in-

stituted against *Hodgson*. He denied that any application had been made to him on the subject, and said, he did not claim any interest in the premises; and he thereby disclaimed all right, title, interest, claim, and demand whatsoever, either as equitable mortgagee, or otherwise howsoever, in, to, or out of the same, and in all and every the matters in issue in the suit. The Plaintiffs filed a replication, but went into no evidence at the hearing.

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v.
STURGIS.
Statement.

Mr. *Walker* and Mr. *Stinton*, for the Plaintiffs.

Argument.

Mr. *Follett*, for the provisional assignee, insisted, first, that the Plaintiffs, having brought the cause to a hearing without proof of their title as devisees of the estate comprised in the agreement, had made no case for a decree in their favour, and that the bill must be dismissed with costs; and, secondly, that, if the bill were sustained, the case should not be governed by the rule laid down, as to costs, in *Appleby v. Duke* (a); for the right of the provisional assignee of *Hodgson's* estate to the benefit of the contract of August, 1825, was one which the assignee had never taken any steps in equity to enforce, and which he would have disclaimed, if the Plaintiffs had applied to him (as it was argued they ought to have done) before the institution of the suit; and the assignee had in fact, by his answer, wholly disclaimed all interest in the premises under the contract.

Mr. *Wright*, for the Defendant *Benson*, took the same objection to the suit. He contended, also, that the answer did not merely disclaim an interest in the property which the Defendant had when the bill was filed, but denied that the Defendant even then had any interest

(a) 1 Phill. 272; S. C., 1 Hare, 308.

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 {
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 —
Argument.

in the property; and that denial was supported by the statement in the bill, that the residue of the purchase-money exceeded the value of the premises, leaving, therefore, nothing in respect of which the Defendant was a necessary party. The purchase-money would belong, not to the devisees, but to the personal representatives of the vendor.

The other cases referred to were, *Clarke v. Wilmot* (a), *Silcock v. Roynon* (b), *Cash v. Belcher* (c), *Thompson v. Kendall* (d).

Mr. *Walker*, in reply, said, that, the Defendants having disclaimed, by their answers, the denial by their counsel of the Plaintiffs' title, was a surprise upon the Plaintiffs, and the Court would give them an opportunity of supplying the proof: *Hood v. Pimm* (e). Both the Defendants had clearly an interest at the institution of the suit;—the assignee, under the contract upon which a large sum had been paid; and the other Defendant, as the depositary of that contract by way of equitable mortgage. The Plaintiffs had no right to suppose that the Defendants would acquiesce in their view as to the value of the lands, or abandon their several interests in the property.

Judgment.

The VICE-CHANCELLOR said, that the question of costs did not depend merely on the words of disclaimer used by the Defendants, but on the point, whether the Defendant shewed, that, at the time the bill was filed, he had no interest in the subject of the suit, and was, therefore, improperly made a party. He had always

(a) 1 Phill. 276.

(b) 2 Y. & C. C. C. 376.

(c) 1 Hare, 310.

(d) 9 Sim. 397.

(e) 4 Sim. 101. See *Woodgate v. Field*, 2 Hare, 216.

considered, and acted upon the rule, that, where a party so disclaimed as to shew that he had no interest in the property when the bill was filed, he was entitled to his costs. That was the disclaimer spoken of by Lord *Redesdale*, where he says, that the precedents are all of an answer and disclaimer, and not of disclaimer simply; for that the plaintiff may require an answer to ascertain whether the defendant has had an interest which he has parted with (a). But where the defendant was properly brought before the Court in respect of an interest at the time the bill was filed, and then said, "I now abandon my interest," it was a question of discretion with the Court either to order the plaintiff to pay the defendant's costs or not, with reference to the circumstances which may have rendered the suit necessary or proper. It appeared to him that the practice of the several branches of the Court proceeded upon the same rule.

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 —
Judgment.

With reference to the other point, the default of proof of the devise of the land to the Plaintiffs,—the suit was the suit of the personal representative,—the names of the devisees were used as instruments for enforcing the payment of the purchase-money. If the Defendants had not disclaimed, the case would have been free from any difficulty on this point; for the objection, in fact, amounted to no more than an objection for want of parties. To have allowed the Plaintiffs the opportunity of proving their case, would be no greater indulgence than permitting the cause to stand over, with leave to amend by adding parties. The difficulty arising from the disclaimer was, that the suit could not proceed unless the Court should give the Plaintiffs leave to bring the devisees before the Court, or to prove the devise to themselves, and thereby prove that the devisees were

(a) Tr. Plead. 319, ed. 4.

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Judgment.

already parties. If, however, the Plaintiffs would submit to pay the costs of the Defendants of the suit, the Court might now make a decree, which would give the Plaintiffs all the benefit of the decree in a foreclosure suit.

Decree.

THIS Court (the Defendants not opposing) doth declare, that the Plaintiffs are absolutely entitled to the estate in the pleadings named; and this Court doth order and decree the same accordingly. And it is ordered, that the Plaintiffs do pay unto the Defendants their costs of this suit, to be taxed, &c. And any of the parties are to be at liberty to apply to this Court, as there shall be occasion.

17th, 19th &
21st January.

The solicitor who had projected, and at his own expense brought forward, a scheme for making a railway, entered into an agreement with the persons who became the provisional committee for prosecuting the undertaking, that the costs and expenses should be paid by such solicitor and projector, and that the members of such provisional committee should not be personally liable to him for such costs and disbursements but that the same should be paid out of the fund to arise from the deposits to be paid on the shares:—*Held*, that this agreement was not illegal as between the provisional committee and the shareholders, regarded as trustee and cestui que trust, inasmuch as the trustee was entitled to be indemnified by his cestui que trust in respect of the costs and expenses properly incurred.

PARSONS v. SPOONER.

THE bill was filed by the Plaintiff, as the proprietor and former solicitor of a joint-stock company, formed for making a railway, to be called the “The Southampton, Manchester, and Oxford Junction Railway,” against the provisional directors of the company. The bill stated, that the project was brought forward by the Plaintiff, with great labour and expense, and was laid before a public meeting, which approved of the undertaking, and at which the members of the provisional committee were appointed, and consented to act in that capacity: that at such meeting it was suggested to the Plaintiff, by the chairman, *Benjamin Oliveira*, (one of the Defendants), that it was usual for the projector, solicitor, and other officers of similar schemes, to take upon themselves the

Whether the contract to pay future costs out of the deposits was illegal as between the solicitor and client, attending to the fact, that the client, being a trustee, might properly stipulate that he should not be personally liable for the costs to be incurred, but that the same should be paid exclusively out of the trust-fund—*Quere?*

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v.
SPOONER.

Statement.

sole risk and responsibility of the undertaking, and to indemnify the provisional committees in respect of the same; and the said chairman handed to the Plaintiff the draft of an agreement to that effect, which, he stated, had been entered into in reference to another similar project; that the Plaintiff, relying on the good faith of the provisional committee, and that he would be continued solicitor to the undertaking, and be paid his costs and disbursements as soon as a sufficient amount of deposits should be obtained, at once acceded to the proposition; and the following memorandum of the agreement was, with the consent of the Plaintiff, appended to the minute of the resolutions, and signed by the chairman on behalf of all present:—"Memorandum: The solicitor and other officers, as they may be appointed, hereby pledge themselves to pay all preliminary expenses, and hereby give a general indemnity to the provisional committee, collectively and individually, against all costs and charges of any sort that may be incurred in prosecuting or promoting this scheme, up to the payment of the deposits, to which fund alone they look for such repayment of such expenses and disbursements, and for professional remuneration: the committee agreeing to repay such costs, expenses, and disbursements, and the reasonable and proper costs of the said officers out of the said deposits." And the bill stated, that the Plaintiff, at the request of the said chairman, signed and sent to each member of the committee a printed circular or form of agreement, as follows:—"Southampton, Manchester, and Oxford Junction Railway. I the undersigned, being the solicitor to the above project, do hereby declare and agree that I do not hold any patron or member of the provisional or managing committee thereof in any way liable or responsible to me for the repayment of any monies I may have expended, or shall expend, in the projecting, promoting, or prosecuting this object, or for

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—
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the payment of any charges for professional or other services rendered by me in relation thereto, or in any way connected therewith; and I declare and agree, that I look to the deposits or joint-stock of the said company alone as the fund and means of repayment of such disbursements and payment of professional and other services. And I undertake to pay and discharge all expenses incidental to the said project, and the prosecuting thereof, and the formation of the company, up to the time of payment of deposits upon shares sufficient in amount to repay, satisfy, and discharge all payments, disbursements, and liabilities made or incurred in respect to the matters aforesaid, or any of them, up to that time; the said deposits or joint fund being held liable for such purpose by the directors or trustees of the company."

The bill then stated, that the Plaintiff continued to devote great labour, and incur heavy expense, in the prosecution of the project; that applications for shares were extremely numerous, and that the deposits paid upon the shares allotted amounted to 50,000*l*. The bill set forth the terms of the parliamentary contract, and the subscribers' agreement, which, it alleged, had been signed by the Defendants and all the shareholders before receiving their scrip certificates. By the subscribers' agreement the Defendants were appointed provisional directors, and were empowered, out of the monies which should come to their hands, or be placed to their credit by way of deposit or payment of calls, or otherwise in relation to the said undertaking, to make such deposits or investments as then were or might be required by the then present or any future standing orders of Parliament; and also to pay and allow all such fees, salaries, and recompense to bankers, counsel, solicitors, and others, who might be employed or retained,

or who might then have been already employed or retained, in the projecting of the said undertaking, or in supporting and protecting the interests thereof, or in opposing any competing scheme or project in Parliament, or otherwise in relation to the said undertaking, as they should think right; and, generally, to apply such monies in or towards the fulfilment of any bargains, engagements, contracts, or agreements, into which they, or the projectors thereof, might have entered, or into which they were thereby empowered to and should enter, for the purposes thereinbefore mentioned, or any of them, and towards the costs of any works or proceedings connected therewith, and in and towards the soliciting, supporting, or opposing such bill or bills in Parliament, as thereinbefore mentioned, and in obtaining the necessary act or acts for carrying out the said undertaking, or any part or parts thereof, and, generally, in paying and satisfying all other costs, charges, expenses, and liabilities which might have been already sustained or incurred in relation to the said undertaking, and which, in their opinion and discretion, ought to be paid and satisfied.

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—
Statement.

The bill then stated, that the Defendants, the provisional directors, sometime afterwards discharged the Plaintiff, and appointed other solicitors; that the sum of 897*l.* remained due to the Plaintiff in respect of his said costs, expenses, and disbursements, for the payment of which he had many times ineffectually applied to the Defendants; that the other shareholders were too numerous, and their shares and interests too fluctuating, to be known to the Plaintiff, or to enable him to make them parties to the suit. The bill prayed, that it might be declared, that, under the circumstances, the deposits which had come into the hands of the Defendants were duly and effectually charged with the payment of all the expenses paid and incurred by the

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Plaintiff in the promotion and carrying into effect of the said scheme, and of the Plaintiff's professional and other costs, charges, and expenses; and that the Plaintiff was entitled to an equitable lien and first charge upon the amount of deposits then in the hands of the Defendants, or any of them, in respect of the said balance or sum of 897*l.*, due to the Plaintiff upon his said bill of costs; and that all proper accounts might, if necessary, be directed to be taken, for the purpose of ascertaining the amount then due to the Plaintiff in respect of his said costs, disbursements, charges, and expenses; and that it might be declared, that the Plaintiff was entitled to a like equitable lien in respect of the amount which, upon taking such account, should be found due to him; and that the Defendants might be decreed to pay such balance or amount to the Plaintiff; and that, in the meantime, the Defendants might be restrained by injunction from parting with, depositing or assigning, transferring or disposing of the monies and securities of the company.

Several of the Defendants demurred for want of equity and want of parties.

Argument.

Mr. *Kenyon Parker* and Mr. *Hetherington*, for the bill; and Mr. *Teed*, Mr. *Romilly*, and Mr. *Shapter*, for the Defendants, in support of the demurrer.

Two of the points in argument were, whether it sufficiently appeared upon the bill that the proper steps had been taken, in conformity with the provisions of the "Act for the Registration, Incorporation, and Regulation of Joint-stock Companies" (*a*), to enable the parties to enter into contracts in their character of a company;

(*a*) 7 & 8 Vict. c. 110.

or whether the promoters of a railway company were in fact within the provisions of the act. On these points the Court was of opinion, that, upon the statements in the bill, it was not open to the Defendants to deny their power of contracting as a company, or their liability in respect of such contract.

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—
Argument.

The other points argued were upon the legality of the contract itself: first, as regarded the authority of the provisional committee to bind the future shareholders, *Edwards v. The Grand Junction Railway Company* (a); secondly, whether a court of equity would enforce a contract by a trustee, that he should not be personally liable for the payment of future costs and disbursements, but that the same should be paid out of the trust fund: *Fuller v. Knight* (b); and, lastly, supposing there should be no objection in equity to such a contract, whether the Plaintiff as a solicitor could enforce a security for costs and disbursements which had not been incurred at the time the security was given: *Jones v. Tripp* (c), *Uppington v. Bullen* (d), *Ex parte Bovill* (e). *Allison v. Herring* (f), a case in which a demurrer was allowed to a bill by a solicitor against a committee, but in which there was no contract for any security, was also cited.

VICE-CHANCELLOR :—

The first and the principal point argued on behalf of the Defendants was founded upon the late act, 7 & 8 Vict. c. 110 (g). It was said that railway companies are with-

Judgment.

(a) 1 Myl. & Cr. 650; 1 Railw. Cas. 173, S. C.

(b) 6 Beav. 208, 211, and the cases cited, p. 208.

(c) Jac. 322.

(d) 2 Dr. & War. 184.

(e) 2 Hare, 179, n. (d).

(f) 9 Sim. 583.

(g) Act for the Registration, &c. of Joint-stock Companies.

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—
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in that act, and that it appeared upon the face of the bill that the provisions of that act had not been observed; that the whole transaction was therefore illegal; and that no contract between the Plaintiff and the provisional committee could be a valid contract, which the Court would enforce. I do not mean to give an opinion upon that question; but I shall assume, for the purpose of the argument, that this case was within the provisions of the act. The bill alleges, in very general terms, that certain steps were duly taken, with a view to the registration of the proceedings of the company. Nothing can be more unsatisfactory than a general allegation of steps being duly taken. Very frequently, that general form of statement is adopted for the purpose of evasion. Looking at this bill throughout, however, it appears that the Plaintiff alleges specifically that certain steps have been taken, namely, the appointment of the provisional directors for the purpose of carrying on the project, the compliance with the standing orders, and that they are about applying to Parliament; and he states, also, that the steps which have been so taken were duly registered. The Defendants, admitting that they are acting as a company, and that their right to do so is entirely founded upon steps taken, yet call upon the Court to infer, from the general allegations in the bill, that certain necessary steps have not been taken. They admit that they have acted since their formation, and are now acting, as a company, and are about to go to Parliament; yet they ask the Court to assume that the general allegations, which aver the legality of their proceedings, are untrue. I cannot, upon general demurrer, make that assumption. The Defendants admit all the specific allegations in the bill, and if those allegations are true, they are now acting as a company, and found their proceedings entirely upon the

preliminary steps which have been taken by the Plaintiff in the cause in their behalf. That leaves the case so far free from difficulty.

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Judgment.

The next question is upon the contract itself. A provisional committee was appointed on the 27th of August, 1845, and a circular letter was signed by the Plaintiff, upon the requisition of Mr. *Oliveira*, acting on behalf of all the provisional directors, and it is on their behalf the circular has been issued. This has been since acquiesced in, and the Plaintiff has taken all the subsequent steps, out of which his present claim arises, upon the faith of that circular and the document signed by Mr. *Oliveira*. Assuming, for the present, that the contract is a legal one, the question is, how far the present company will be affected by it? The bill states the agreement which has been made by the provisional committee, and the subsequent proceedings under which the provisional directors have been appointed, and the company has acted,—the allotment of shares, the payment of deposits to the amount of 50,000*l.*, and the carrying on of the affairs of the company. Under these circumstances, if there has been one continual transaction, in which the provisional committee acted at first, and in which they have since continued to act, I must assume that the provisional directors of the company are now proceeding upon the basis of what has been done by the committee (for there has been no interruption), and they are bound by a legal contract made by the committee for the payment of expenses properly incurred in the preparation of a scheme which has been acted upon and carried on down to the present time. This conclusion is inevitable. Upon the bill before the Court, I am of opinion, that, if it is a legal agreement, the company are bound by what has taken place.

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v.
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—
Judgment.

It is said, however, that the agreement is altogether illegal; that the provisional committee are to be viewed as trustees for the company; and that, being so, they did an illegal act when they contracted with Mr. *Parsons*, who was solicitor to the company, that they the provisional committee should not be personally liable to the solicitor, but that the solicitor should be paid out of the fund. The argument is, that a trustee has no right to make that species of contract; because (as it was said) it deprived, or tended to deprive, the cestuis que trust of the benefit of that security which they would have from the diligence of the trustee himself, if he were acting upon his own personal responsibility. I cannot accede to the correctness of that argument. *Primâ facie*, the trustee has a right to be indemnified by his cestui que trust before he incurs any liability. An indemnity is not often necessary; for, in ordinary circumstances, a trustee retains in his hands funds by which he is able to indemnify himself; and this he may always do, for the Court never takes the fund out of his hands until he has been paid all the expenses which he has properly incurred. Wherever the party who is acting is a trustee, the cestui que trust have this security, that the Court will allow the trustee no expenses but what are properly incurred. On the other hand, every step which a trustee takes, is a step taken with knowledge, on his part, that he will be indemnified for all his proper and needful expenses. I do not, therefore, see, upon the specific allegations contained in this bill, of what security the cestuis que trust are deprived (if they are deprived of any) which the general rules of the Court would give them. It does not appear to me that they are deprived of any such security. It is always in their power to have the conduct of their trustee investigated, and the latter will be made responsible for any

waste of the funds entrusted to him. In this case, therefore, (not meaning to intimate that there might not be cases in which such an objection might apply), I am of opinion, that there is nothing to shew any illegality in the contract.

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 v.
 SPOONER.
 Judgment.

Another ground upon which the illegality has been argued is, that it is a contract by a solicitor with his clients for a security for his costs, and that a solicitor is not allowed to contract for a security for his costs, whether professional or out of pocket, before those expenses have been incurred. If, however, the client, being a trustee, were to agree with a solicitor that he should not make a demand upon him personally, but that, when the funds should come to hand, he should be paid out of those funds such claim as he might have a right to make against them,—such a contract may be very different from the common one to which the rule applies. On this point, I do not, however, think it is necessary to say more than that the present case does not fall within the general rule which has been referred to; for, looking at the two documents,—the one signed by Mr. *Oliveira* on behalf of the Company, and the other signed by the Plaintiff, and circulated at the request of Mr. *Oliveira*, and acquiesced in by the Company,—I think, upon a fair construction of these two instruments, and the facts stated in the bill, that, prior to the appointment of the provisional committee, some expenses were incurred by the Plaintiff in promoting the scheme, to the payment of which he might be entitled. There can be nothing illegal in the contract, that he should, out of the deposits, be paid the expenses which had been incurred in the preparation of the scheme adopted by the provisional committee on the 27th of August; and, if so, there will be sufficient to entitle the Plaintiff upon the bill to some relief, whether he be or be not entitled to all he asks.

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 —
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[On the other points discussed in the argument, on the question of parties, and on the particular form of the allegations in the bill, His Honor held that the demurrer could not be sustained. On the point of parties, *Meux v. Maltby* (a), *Adair v. New River Company* (b), *Richardson v. Larpent* (c), *Lund v. Blanshard* (d), and *Wilson v. Goodman* (e), were cited.]

Demurrer overruled.

(a) 2 Swan. 277.

(b) 11 Ves. 429.

(c) 2 Y. & C. C. 507.

(d) 4 Hare, 9.

(e) Id. 54.

21st, 23rd,
 24th, & 27th
 February.

WALFORD v. ADIE.

One of the members of the committee of management of a joint-stock company sold his shares to the committee, on behalf of the company, at a price not exceeding the market price of the shares at that time. The shares were transferred to the trustees in trust for the company, and the vendor thenceforward ceased to interfere in their affairs. Three

years after it was known to the shareholders generally that the shares had been sold to the company, the company having during that time continued the business, and having obtained new Parliamentary powers, the Plaintiff, on behalf of himself and all the shareholders in the company, filed his bill against the vendor to set aside the sale and transfer of the shares as fraudulent; and to obtain contribution from the vendor towards the debts of the company. The Court refused to disturb the sale, and dismissed the bill, with costs.

THE Defendant, *Thomas Adie*, was, in 1835, the proprietor of twenty-two shares in a joint-stock company, called "*The Birmingham Coal Company*." The capital of the company was originally 50,000*l.*, divided into 1000 shares of 50*l.* each; and their business was carried on under the regulations of a deed of settlement, dated in 1793. By an act of Parliament passed in the year 1827, enabling the company to sue and be sued by their secretary or one of their members, all transfers of shares were directed to be inrolled in Chancery within twelve months from the time of transfer. The act of 1827 was amended by an act passed in 1836, whereby the company were empowered to borrow money to extend their works, and also to apportion the debts of the

company amongst the shareholders. The committee of management consisted, according to the deed of settlement, of eight shareholders chosen at the annual general meetings of the company. Mr. *Adie* the Defendant, in October, 1835, being then one of the committee, sold his twenty-two shares to the committee, who purchased them on behalf of the company, for the sum of 33*l*. By a deed of transfer the twenty-two shares were assigned, in trust for the company, to the Defendant *James Robinson*, their secretary, and a memorial of the transfer was duly enrolled according to the Act. By resolutions passed in 1837, 1838, and 1840, sums of 40*l*., 15*l*., and 20*l*. per share, respectively, were called for from the shareholders, by way of contribution towards the debts of the company. In February, 1841, the Plaintiff *Walford*, and another shareholder of the company, filed their original bill on behalf of themselves and the other holders of shares in the company, against *Thomas Adie* and *James Robinson*, praying a declaration of the Court, that the transfer of the twenty-two shares was fraudulent and void, and that the same ought to be cancelled; that *Adie* might be ordered to repay the 33*l*. to the company, with interest; and might also be declared liable to contribute towards the payment of the debts of the company, the respective sums of 40*l*., 15*l*., and 20*l*. per share on the twenty-two shares. A supplemental bill was filed by the Plaintiff *Walford* in March, 1844(a), after the answers to the original bill had been put in. The supplemental bill brought forward other statements of fact, but prayed no additional relief. The points upon which the decision was founded, and the material facts not contained in the foregoing statement of the case, sufficiently appear in the judgment.

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 —
 Statement.

(a) The other plaintiff had died.

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 —
 Argument.

Mr. *Romilly* and Mr. *Daniel*, for the Plaintiff.

Mr. *Wood* and Mr. *Stinton*, for the Defendant *Adie*.

Mr. *Shadwell*, for *Robinson*.

The only cases mentioned as having any bearing on the points at issue, were *Const v. Harris* (a), and *Edwards v. Meyrick* (b).

27th Feb.
 Judgment.

VICE-CHANCELLOR :—

The bill, in this case, is brought by *John Walford*, on behalf of himself and the other members of the *Birmingham Coal Company*, against *Thomas Adie*, seeking to avoid a sale by *Adie* to the company of twenty-two shares in the company, and to have it declared that *Adie* is, in equity, a shareholder in respect of the same twenty-two shares, and liable to contribute, rateably with the other shareholders, to the payment of the debts of the company; and the bill prays contribution accordingly. The Defendant *James Robinson* was the secretary of the company, into whose name, as trustee for the company, the twenty-two shares were transferred. The sale was made on the 27th of July, 1835. The transfer took place on the 5th of October; and was registered on the 13th of November, in the same year. At the time of the sale *Adie* was a member of the committee of management. After the sale was completed by the transfer on the 5th of October, *Adie* ceased to have any connexion with the company.

The original bill suggests that the company was at the time of the sale embarrassed, and that *Adie* at the

(a) T. & R. 523.

(b) 2 Hare, 60.

time knew this, and sold to the company, in order to escape from his liabilities; that the regulations of the company, applicable to the transfer of shares, were not observed; and that the sale was void. But I do not find any suggestion that the committee of management exceeded its authority in buying the shares on behalf of the company, or that the price exceeded the value or market price of the shares at the time; although the supplemental bill contains charges of false and fraudulent representations made by the committee of management respecting the state of the affairs of the company, and to which it is said *Adie* was a party.

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 WALFORD
 v.
 ADIE.
 —
Judgment.

Assuming the authority to buy to be in the committee of management, and that there was nothing in the price to affect the case, I will first suppose the position of *Adie*, as a member of the committee of management, not to have brought him within the scope of any equitable rule, which would place him under an incapacity to sell to the company;—Would the sale of his shares in that case be impeachable, on the ground of fraud or otherwise? An answer to this question, will be material in support of the view I take of another branch of the case. My opinion is, that the sale in this view could not be impeached; that the concerns of the company were at the time of the sale in a very depressed state cannot perhaps be disputed; but that it was the duty of any shareholder, on that account only, to retain his shares no one can with success contend. And if that be so, the position of *Adie*, as a member of the committee of management, would not place him in a different position, unless it could be shewn that he took undue advantage of the knowledge he acquired from his position to sell his shares above their value to a party who had not the same knowledge with himself. But this was not the case here. The committee of management thought it

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—
Judgment.

for the interest of the company, that it should become the purchaser of shares. The individuals comprising this body, I think eight in number, including *Adie*, had precisely the same information with *Adie* himself. Mr. *Tindall*, the solicitor to the company, was one of that body, and was generally, if not always, chairman at the meetings of the committee. The price paid *Adie* for his twenty-two shares was 30*s.* per share. This was on the 27th of July, 1835. On the 13th of the same month, the committee had purchased through *Whitten*, another member of the committee, other shares, I think thirty, at the same price of 30*s.* per share; and on the same day on which the committee purchased *Adie's* shares (27th of July) they purchased twenty-one other shares through *Whitten*, at 32*s.* 6*d.* per share. If the purchases were really onerous to the company, the members of the committee, other than *Adie*, were acting in direct opposition to their individual interests; for it appears that more than one-fourth of the shares of the whole concern were holden by the members of the committee. And when to the above I add the consideration, that, if it were *Adie's* object to get out of the concern, there was nothing in the regulations of the company preventing his doing so, even, as it was said, selling to a purchaser in insolvent circumstances; and when I find that every thing was done openly, and the whole transaction entered in the books of the concern, I cannot but conclude that the transaction was in truth that which it appeared to be, and which *Adie* says it was,—that he desired, as any other shareholder might, to retire from the concern by selling his shares; and finding the company was a purchaser, he allowed the company to take his shares. I agree, moreover, with Mr. *Wood*, that, however depressed the concerns of the company might have been, there is abundant evidence furnished by the act of Parliament obtained in 1836, that the company contemplated carrying on its concerns with effect, at least until a pur-

chaser of the entire concern could be found. Unless therefore the position of Mr. *Adie* as a member of the committee varies the case, there is nothing in the sale alone to invalidate the transaction.

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 Judgment.

The question which I have next to consider is, whether *Adie's* position, as a member of the committee of management, rendered the sale voidable. The argument must be, that *Adie's* contract to sell would not bind the company, unless made with all the committee,—that *Adie* was in the sale incapacitated to act both as seller and as a member of the committee, and consequently that the committee for the time being could not in equity enter into the contract. Considering the principle involved in this objection as of the greatest importance, I shall assume the objection to be well founded, and consider whether upon that assumption the present bill can be sustained, always remembering that the price at which the shares were sold is not the question,—the retirement of the Defendant and his consequent escape from liability being the gravamen of the complaint.

Upon this point, I have felt perhaps less difficulty during the argument, than upon any part of the case. The Defendant *Adie* was a shareholder in a mining partnership. In July, 1835, he retired from that partnership, by selling his shares to the company, and he has ever since lost all the privileges of a partner, including that of being served with notice of, and taking part in, its proceedings. The sale of *Adie's* shares was (as I assume for the purposes of the argument) voidable at the option of the company. But, if the company, in such a case, thought fit to avoid the sale, it was bound to do so with promptness. The company, having notice of the sale, and of *Adie's* retirement, could not be permitted to carry on the concern in the absence of *Adie*—prepared to affirm the transaction, if the concern should

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 ———
Judgment.

prosper or to rescind it, if that should prove to be for their advantage. In a concern of such a nature, it was the right of *Adie* to know, at the earliest moment, whether the company elected to treat the sale as valid or not, especially where, as in this case, he might, if advised that the company disputed the contract, have retired from the concern by other arrangements, without consulting the company. No steps, however, were in fact taken from the time of the sale in July, 1835, until February, 1841, when the bill was filed. During this interval the company obtained, and has since acted under the provisions of, the act of Parliament passed in June, 1836, for enlarging its capital, creating new shares, and extending its mining operations; and *Adie* has been permitted during that time to consider himself unconnected with, and uninterested in, the concerns of the company.

One question then is, from what time am I to consider the company as having acquiesced in the sale? in other words, at what time am I to consider the company as having had notice of the sale? Now, the 5th of October, 1835, is the date which, if the sale is to be supported, determined *Adie's* connexion with the company. He never after that attended to or interfered in the business of the company. The sale of his shares to the company, and everything connected with that sale, including the registration of the shares, was open and undisguised. Upon *Adie's* retirement, the committee of management consisted of those, who being members with him remained until his place was filled up; and the concerns were afterwards carried on by a managing committee of nine, chosen annually. Now, if the shareholders generally had managed their own concerns, as in the case of an ordinary partnership, it would, in such a case as this, be presumed that they were acquainted with the contents of their own books, especially so far as they relate to recent transactions, like that in question; and if, instead

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—
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of managing for themselves, the shareholders constitute a managing committee, it must be presumed that this managing body, which represented the company, knew the contents of the books of the company also, and to the shareholders at large the knowledge which their committee thus acquired must be imputed. The committee which issued the circular at the first general meeting after *Adie's* retirement, and who first omitted his name from the list of shareholders, must have known to whom he had assigned his shares. It is not, however, necessary to rely upon this reasoning alone. Independently of any merely constructive notice, I think that the body of shareholders is bound by its acquiescence. Each shareholder would, from the circular sent round at the annual meeting, know whether *Adie* was a continuing shareholder or not: although that alone might not be notice that his shares had been sold to the company. After the meeting of March, 1836, it is admitted that the fact of *Adie* having ceased to be a shareholder, became the subject of discussion among the shareholders; but, it is stated, that it was not then known to whom he had sold them. It is clear, however, that immediately after the June meeting, in the year 1837, it became known to the shareholders, or some of them, including Mr. *Walford*, the present Plaintiff, that Mr. *Adie's* shares had been sold to the company; and notwithstanding this notice, no special meeting is called, nor is any step taken in the matter until August, 1838, and then a committee is appointed to inquire into the transaction.

Some time in the year 1838, and at a time when it is admitted the shareholders had complete notice of the transaction, the action, which I shall call the second action, was brought against *Wynne*; that was an action for contribution, and involved the question whether *Adie* was a shareholder or not, because, according as *Adie* was a shareholder or not, the share of Mr. *Wynne*,

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Judgment.

and therefore the amount of his liability to contribution, would be larger or smaller; and it appears that question was taken into consideration at the meeting. It is quite clear, that, at law, there was but one decision which could be come to, that the sale of the shares was legal, and the contribution right; but still the company was, in truth, for its own benefit, against *Wynne*, affirming the validity of this transaction. Whatever might be the case at law, they had no right to charge *Wynne* with a larger contribution than he would be liable to, treating *Adie* as a shareholder, if they meant afterwards to say that *Adie* himself was to be liable also. I do not say this is an estoppel in this case, but it is a deliberate act done by the company, by which they affirmed the validity of that which they now dispute. This took place in 1838. In December, 1839, the opinion of an eminent counsel was obtained as to the right of the company against Mr. *Adie*; and a second opinion was obtained in February, 1840. I am not aware, that, since that time, any thing has occurred to give the company more knowledge of the facts, or of their rights, or at all to alter the case as between them and Mr. *Adie*. No application was then made to the managing committee to call a special meeting for the purpose of considering the subject of the sale, nor was any step whatever taken until June, 1840, when a general meeting of the company was held, and the opinions of their counsel were produced. I have not seen either the cases or the opinions, but I advert to them for the purpose of shewing, that, from that time at all events, there is actual knowledge on the part of the body of the shareholders of their position with reference to these shares, actual knowledge—independently of any constructive knowledge which might be imputed to them through their committee. In June, 1840, then, they have notice of the rights which they suppose they have against Mr. *Adie*; they knew also that this mining concern had been carried on since

July, 1837, in the absence of Mr. *Adie*; and the question before them is, what course they should take? Having taken from August, 1838, to February, 1840, to get the information which I should have thought they might have got in three weeks, in June, 1840, they communicate to the body of shareholders the knowledge which they have obtained; and it is not until February, 1841, that the bill is filed to impeach the transaction. Now, I do not find any explanation of this delay; and the question is, whether I am now to pronounce a decree which would have the effect of making Mr. *Adie* a partner from July, 1837, in a trading concern of a fluctuating character, thereby involving him in all the transactions of the company which have since taken place,—the case, as I have observed, being one in which there was not the least impediment to Mr. *Adie* getting rid of his shares without the consent of the company, if he thought fit to do so; and the company having, in the way I have mentioned, had notice of the transaction.

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 ADIE.
 Judgment.

There are one or two points which I will briefly notice. The bill charges that there was a non-compliance with the regulations of the company as to the transfer. The meaning of that allegation I understand to be this,—every person who comes in as a shareholder, is to subscribe a deed, by which he takes on himself certain liabilities on the transfer of these shares. Mr. *Robinson* did not do that, and therefore it is said the regulations of the company have not been complied with. It is quite obvious, that, if Mr. *Robinson* represented the company, (which he did), it could not be necessary that Mr. *Robinson* should execute the deed. The effect would be nothing. It would be the company, in the person of Mr. *Robinson*, coming under a liability to itself.

A great number of facts have been gone into with

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 v.
 ADIE.
 —
Judgment.

respect to the specific acts which have been done since the retirement of Mr. *Adie*. I have not entered into the consideration of these facts. They are important as shewing the soundness of the general rule, which imposes upon parties engaged in a fluctuating and precarious concern of this kind, the necessity of being very prompt in stating what their intentions are in such a case as this, but they are only important as they illustrate the general rule; for if the acquiescence be made out, it must be a very strong case in which the Court would say, that merely because it can be shewn that no serious prejudice will follow to the party who is sought to be made a shareholder, therefore the Court is to disregard the principle which otherwise would operate in his favour.

Another point, very much pressed, was the fraud to which it is said Mr. *Adie* was a party, in misrepresenting the state of the accounts in the year 1835. Mr. *Adie* denies actual knowledge of these accounts, and I could not certainly, without inquiry, trust to the evidence of Mr. *Robinson*, who states generally what the motive of the committee of management was in the course that was taken respecting those accounts; I think, however, that the observation which applies to it all is this,—if Mr. *Adie* were guilty of a fraud in this misrepresentation, and the company had suffered by it, he might or might not have made himself liable to the company in respect of such act of fraud; but I confess I cannot, in the slightest degree, connect these alleged misrepresentations with the act which is the sole subject of complaint here, which amounts to this,—that, having made up his mind to retire from the concern, and wishing to sell his shares, and finding the committee were buying shares of other people, Mr. *Adie* allowed them to take his shares at the same price as they had given for other shares, instead of looking out for that which it

was not difficult to find, a purchaser of his shares elsewhere than among the committee of management.

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v.
ASTLE.
Judgment.

I confess I think justice will be done by dismissing this bill. The purchase of the shares is impeached upon equitable grounds; but this equity is resorted to, not because the purchase in itself was injurious, quâ purchase, but for a collateral purpose.

My great doubt has been as to costs. The sale, as it was effected, was, in strictness, irregular. A party in the situation of the Defendant ought not to have sold his own shares to the company; but the entire transaction was known to all parties, and I cannot say that they have suffered any injury from it, or were justified in filing this bill to impeach it. I dismiss the bill, with costs.

GOLDSMITH v. GOLDSMITH.

11th, 12th, &
13th Feb.

UNDER the decree made at the hearing, the parties were to produce before the Master, all books, papers, &c., in their possession relating to the matters in question in the cause. The Defendant was an executor, and had been allowed to appear in formâ pauperis. An attachment, and afterwards a sequestration, was issued against him for contempt in not producing before the Master documents which appeared to be in his possession. The sequestrators seized, and were in possession of certain chattels, consisting of household goods, furniture, and effects, belonging to the Defendant.

A sequestration on *meane* process will, in a proper case, be executed, and the Court will direct the tenants to attorn to the sequestrators; but will not, until the amount of the costs is ascertained, nor except for the purpose of paying such ascertained amount of costs, direct the sale of goods seized

under the sequestration, even though the value of the goods be gradually absorbed by the expenses of keeping them.

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 v.
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 ———
Statement.

It appeared that the Defendant was entitled under the will of the testator in the cause to certain leasehold premises then in the occupation of tenants. The goods and furniture were retained by the sequestrators at an expense of 13*s.* 4*d.* per diem, for rent and charges.

Argument.

Mr. *Rolt* moved that the Defendant might be dispaupered; that the tenants might be ordered to attorn to the sequestrators; and that the goods and furniture might be sold, and, after satisfying the costs of the contempt, the surplus might be paid to the credit of the cause.

In support of the first branch of the motion, the vexatious conduct of the Defendant, in disobeying the order of the Court and standing out the process to contempt, was insisted upon: *Wagner v. Mears* (a). On the attornment of the tenants to the sequestrator, the cases of *Rowley v. Ridley* (b) and *Simmonds v. Lord Kinnaird* (c) were referred to. With respect to the sale of the furniture, it was contended, that the Court would direct perishable articles to be sold: *Shaw v. Wright* (d). And within that reason would fall not only articles naturally subject to rapid decay, but all articles of which the value was in the course of exhaustion. In this case, the constantly accruing expense of keeping possession of the furniture, would soon exceed and exhaust the value of the goods: *Wharam v. Broughton* (e), *Cadell v. Smith* (f), *Desborough v. Crommie* (g).

(a) 3 Sim. 127.

(b) 2 Dick. 622; S. C. 3
 Swanst. 306, n.

(c) 4 Ves. 738.

(d) 3 Ves. 23.

(e) 1 Ves. 180.

(f) 3 Swanst. 308, n.

(g) Bunb. 272; 1 Barnard.
 K. B. 212.

Mr. *Blunt*, for the Defendant, opposed the application. He argued, that there was no case in which the Court had dispaupered the Defendant in a suit, owing to his conduct in the course of his defence. In the case cited (*Wagner v. Mears*), the pauper was the Plaintiff. He argued also, that the Court would not direct a sale of goods taken under a sequestration issued on mesne process, but would merely hold the goods until the Defendant had cleared his contempt: *Hales v. Shaftoe* (a), *Knight v. Young* (b), *Wilcocks v. Wilcocks* (c), *Maynard v. Pomfret* (d).

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Argument.

VICE-CHANCELLOR:—

Judgment.

It appears by the affidavits on this motion, which the Defendant has left wholly unanswered, that he was, before the sequestration, possessed of this furniture, which is worth more than 20*l.*; the order enabling him to sue in formâ pauperis was at the same time obtained on the usual affidavit, that he had not property to the value of 5*l.* No explanation is attempted to be given; and under the circumstances I think I ought to direct the Defendant to be dispaupered.

It appearing on affidavits that a pauper defendant was entitled to property exceeding 20*l.* in value, the Court on motion ordered him to be dispaupered.

I assume that the process upon which the other part of the motion is founded has been issued regularly, and that there is no question that this is the proper proceeding to enforce obedience to the decree. If it should become necessary in this case for me to express any opinion on the various cases which have been cited, I must first ascertain from the officers of the Court whether there really exists any difficulty on the point.

- (a) 1 Ves. jun. 86; 3 Bro. C. C. 72; 2 Cox, 224, S. C.
(b) 2 V. & B. 184.
(c) Amb. 421.
(d) 3 Atk. 468.

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 v.
 GOLDSMITH.
 —
Judgment.

I believe, if the cases are examined, no difficulty will be found. It is stated in the argument of Mr. *Dickens* in *Rowley v. Ridley* (a), which he says he gave to Lord *Thurlow*, and on which the argument in this case principally turned, that sequestration issues in two cases: one is upon a decree ad satisfaciendum, which is not the case here; the other is on meane process: and Mr. *Dickens* says, that inasmuch as the only use of the meane process is to ground some further proceeding, as to take the bill pro confesso, the sequestration is never executed; he refers to the case of *Heather v. Waterman* (b), where Sir *Thomas Sewell* is reported to have expressed great disapprobation at a party having executed such a sequestration, and to have said, that it never could be done properly. Mr. *Dickens* refers to a number of cases to the same effect, and goes on to reason,—and I should say very satisfactorily,—upon those particular cases,—shewing that there is no necessity to execute the attachment, unless it is necessary to obtain payment of the costs and expenses, because, if the only object is to found an ulterior proceeding,—as to take the bill pro confesso,—if that can be done as effectually without executing the attachment as after its execution, there is no reason, as the Master of the Rolls observed, why it should be executed. But Mr. *Dickens* appears to me to have omitted the consideration, that, in a great number of cases, as for example in the present case, the object of the sequestration on meane process is not merely to found some ulterior proceeding, but to compel the party to obey the order of the Court. That might occur in the case of the want of an answer, a discovery being required. In this case, where the object is to compel the production of papers, the observation as to the proceeding being merely a ground for some ulterior process, does not

(a) 2 Dick. 622.

(b) 1 Dick. 835.

apply. Here the object is, to enforce obedience to the order. And I am not at all surprised to find upon referring to another report of the case of *Rowley v. Ridley*, by a reporter not less accurate than Mr. *Dickens*, that a totally different view of the case is taken. I refer to the note to the case of *Franchlyn v. Calhoun*, in Mr. *Swanston's Reports* (a). And in the report of the case of *Simmons v. Lord Kinnaird* (b), I observe that Lord *Rodesdale*, the then Solicitor-General, points out in his argument the inaccuracy of the note of Mr. *Dickens*. From Mr. *Swanston's* note, it appears that it was a bill of discovery, and that the Defendant appeared, but did not put in his answer; whereupon it was moved as a motion of course that the tenants of the estate might attorn to the sequestrators; when the Registrar was about to draw up the order he thought it irregular, and the motion before the Lord Chancellor was renewed. [His Honor read the judgment of the Lord Chancellor (c) refusing the motion as premature, before the return of the commission.] I may observe, that Mr. *Dickens*, after attempting to shew, that, according to the precedents and his experience, the tenants should not attorn, because meane process ought never to be executed,—says, that if the sequestrators are in possession, they may distrain; but if they are not in possession, their proper course (so he seems to say) is to apply for a writ to deliver possession, and follow it with a writ of assistance,—which is in fact only another mode of executing the sequestration. Lord *Thurlow*, in considering how the sequestration ought to be executed, said it had been compared to the case of a receiver appointed by the Court; and upon that idea the motion had been made for the tenants to attorn, which was a special

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(a) 3 Swanst. 306, n. (b).

(b) 4 Ves. 725.

(c) 3 Swanst. 306, n.

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motion, and notice ought to have been given to the tenants; but there was a great difference between a sequestration, which was a writ of process, and an order for a receiver, which was an order of the Court (a). In another case, *Lord Pelham v. Duchess of Newcastle* (b), where a party applied to be examined pro interesse suo, the Court would not make the order until there had been a return by the sequestrators; that however is merely a technical objection. In *Hales v. Shaftoe* (c), the Lord Chancellor said, that where the object was to compel a party to obey an order, he would do it, not by selling his property, but by putting him out of possession until he obeyed the order. That case came on several times, upon motion to sell the property, and the Court certainly refused to direct a sale. But all the Lord Chancellor said was, that he had no rule to go by, as to the quantum to be sold (d). There were no means of ascertaining the amount of the demand, or how it should be measured. The proposition was not that the Court had not a right to execute the writ, but that the parties were wrong to the extent of applying for a sale.

The case of *Knight v. Young* (e) is the most embarrassing. Lord *Eldon* in that case said, that after the long series of authorities the other way he could not grant the application. It is remarkable, that only two cases appear to have been cited, and one of them is the note of *Rowley v. Ridley*, in Mr. *Dickens's Reports*, in which, from the other accounts of the same case, it is obvious that there are many mistakes. I have no doubt, that, subject to the formal question, whether there has been

(a) 3 Swanst. 307, n.

C. 72 ; 2 Cox, 224, S. C.

(b) Id. 290, n.

(d) 2 Cox, 224.

(c) 1 Ves. jun. 86 ; 3 Bro. C.

(e) 2 V. & B. 184.

a return, I shall be right in ordering the attornment; but I must see whether there has been any return to enable me to do it.

As to selling property under sequestration to pay the costs,—the cases shew that that can be done. Mr. *Dickens* refers to cases in which it has been ordered. If the party will not or cannot pay the costs, the Court will not give him back his property till he does. Lord *Thurlow*, Lord *Rosslyn*, and all the judges, without exception, say, that the Court cannot sell upon mesne process except to pay expenses,—the only object being to compel the party to obey the order of the Court by keeping him out of possession, and there being beyond that no measure of the amount for which the property is to be sold. If, in this case, there has been a return, I will make an order for the attornment; but I cannot make an order to sell the goods until all the costs are ascertained. It would be oppressive, if not irregular, to sell to pay the costs from day to day.

[The motion stood over to ascertain whether there had been a return to the sequestration, or whether such return was in practice now required.]

Mr. *Rolt*, on a subsequent day, stated, that the return of the sequestrators had been made, but none of the offices would receive it.

The VICE-CHANCELLOR, after inquiry, said he found that it was not the practice to file the return to the writ of sequestration. He made the order for the attornment, directing notice thereof to be given to the tenants.

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1845.

Nov. 20th.

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The Plaintiff, under a will, claimed a fund over which the testatrix had a power of appointment, and which was subject to a gift over, in default of appointment, to the children of the donor of the power. The trustees did not admit that the will was an effectual appointment:—*Held*, that, although the Plaintiff's title was not admitted, it was a case in which the persons entitled in default of appointment were necessary parties, and where the Court would therefore, under the Order V of the 9th of May, 1839, direct preliminary inquiries to ascertain who were such persons.

MR. BIGG moved for a preliminary reference to the Master, to inquire who were the issue of the children of *John Hill* living at the death of *Eliza Johns*, and their respective ages, and whether any had since died, and if so, who were their respective representatives.

The Plaintiff, under the will of his late wife, *Eliza Johns*, made in 1831, claimed a sum of 1428*l.* stock. Under the will of the said *John Hill*, her father, the wife was entitled to the stock for her life, with a power of appointment by will, and a provision, that, in default of appointment, if she had no issue, the stock should go and be divided between the lawful issue of the other children of *John Hill*. The will of *Eliza Johns* did not refer to the power, but the bill alleged that she had no property which could pass by the will, except the stock subject to her appointment. The persons alleged to be the issue of the other children of *John Hill*, who would, in default of appointment, be entitled to the property, were made defendants. The trustees by their answer said, they believed that the other defendants, or some of them, were the persons who would be entitled to the property if it did not pass by the appointment; and they submitted to the Court the question as to the appointment.

Mr. Bilton, for some of the issue of the children of *John Hill*, and *Mr. Speed*, for others of such issue, opposed the motion.—The Plaintiff's title had not been admitted, and the bill might be dismissed at the hearing: *Topham v. Lightbody* (a).

(a) 1 Hare, 289.

Mr. *Amphlett*, for the trustees.

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The VICE-CHANCELLOR said, that the Court at the hearing must decide whether the will was an exercise by the testatrix of the power of appointment; and that question the Court could not decide in the absence of the parties interested in disputing the validity of the appointment, as affecting the fund. It would be therefore necessary, at the hearing, to ascertain that the parties entitled in default of appointment were before the Court.

Order made.

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1845.
18th, 19th,
20th, and
21st Nov.
1846.
14th Jan

ON the 30th of December, 1840, *Sarah M^{rs} Lauchlan* was possessed of two sums of stock, 805*l.* Consols and 265*l.* Long Annuities, and was entitled to a sum of 500*l.* owing to her by *James Buckell*, the Plaintiff; 360*l.* owing to her by *Paxton & Co.*; and 50*l.* owing to her by *John Ballandine*. She was also, at the same time, possessed of thirty-nine shares in the Gas-light and Coke Company, and of sundry household goods, chargeable with such sum or sums of money, and for such intents and purposes, and in such manner, in all respects, as the appointor should, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by one witness or more, direct or appoint. The appointor afterwards made her will, (which was duly executed and attested according to the Statute of Wills), and thereby bequeathed part of the trust funds:—*Held*, that the will was a writing within the terms of the power.

The mere fact, that a party, having a power by deed to revoke and make a new appointment of trust funds, has attempted to make such revocation and new appointment by will, owing to her having forgotten the restrictions of the power, and being at the time unable to procure the deeds,—is not a ground upon which equity will supply the formal execution required by the terms of the power, or give to the will the effect of a deed, or convert the trustees of the property into trustees for the persons who would be appointees, if the will were a good execution of the power.

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furniture, fixtures, plate, linen, china, books, pictures, prints, jewellery, and other effects then in her residence.

By indenture of the 30th of December, 1840, made between *Sarah M^cLauchlan* of the one part, and *John Blenkhorn* and *John Alexander Blenkhorn* of the other part, reciting that she was possessed of the before-mentioned property and effects, and reciting her intention to settle the same, *Sarah M^cLauchlan* assigned part of the property and effects, and agreed to assign the other part, to the said *J. and J. A. Blenkhorn*, upon trust for herself for life, and, after her death, in trust for such person or persons, for such interest or interests, chargeable with such sums of money, and for such intents and purposes, and in such manner, in all respects, as she the said *Sarah M^cLauchlan* should, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by one witness or more, direct or appoint; with limitations over in default of appointment: and power was thereby reserved to the parties to vary the securities or investments.

After the execution of the deed of December, 1840, the 805*l.* Consols, and 193*l.* Long Annuities, part of the 265*l.* Long Annuities, and the thirty-nine shares in the Gas-light and Coke Company, were transferred into the joint names of *Sarah M^cLauchlan* and *J. and J. A. Blenkhorn*, the trustees of the deed. The remaining sum of 72*l.* Long Annuities was sold, and the proceeds, together with the 50*l.* which had been paid by *Ballantine*, were laid out in the purchase of 450*l.* Consols, in the joint names of *Sarah M^cLauchlan*, *J. and J. A. Blenkhorn*, and the Plaintiff, *James Buckell*, but upon the trusts of the indenture of the 30th of December, 1840. The Plaintiff also had paid 100*l.* in part discharge of the said sum of 500*l.*, owing from him; and such 100*l.*

had, at the desire of *Sarah M^cLauchlan*, been paid to the Plaintiff's daughter, *Matilda Charlotte Buckell*, in anticipation of the appointment thereafter made to her.

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By a deed-poll, dated the 27th of April, 1842, under her hand and seal, and attested by two witnesses, *Sarah M^cLauchlan*,—after reciting that she was desirous, in exercise of the power of appointment reserved to her by the indenture of December, 1840, and by an immediate assignment of her life interest in the 100*l.*, of vesting in the Plaintiff's daughter the 100*l.* which had been paid to her; and was also desirous, by virtue of the same power, of making such appointment of the remainder of the trust property after her decease as thereafter mentioned,—thereby appointed 100*l.* to the Plaintiff's daughter; and as to the remainder of the trust property, after her (*Sarah M^cLauchlan's*) death, she appointed the same in manner therein mentioned. And she thereby declared, that (with the exception of the 100*l.* thereby appointed to the Plaintiff's daughter) it should be lawful for her, by any deed or deeds, to be executed by her in the presence of and attested by one or more witnesses, to revoke the appointments thereby made, or any of them; and by the same, or any other deed or deeds, to be executed or attested in the same manner, to make such new or other appointments of the trust property as she might think proper.

By an indenture of the 1st of September, 1843, made between *Sarah M^cLauchlan* of the first part, *J. and J. A. Blenkhorn* of the second part, *J. and J. A. Blenkhorn* and the Plaintiff of the third part, *Thomas Johns*, of the fourth part, and *J. and J. A. Blenkhorn* and the Plaintiff and *Thomas Johns* of the fifth part, reciting the indenture of the 30th of December, 1840, the deed-poll of the 27th of April, 1842, and the power of revocation therein contained,—*Sarah M^cLauchlan* revoked

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the deed-poll of the 27th of April, 1842, and the appointment thereby made, except as to the 100*l*. for the Plaintiff's daughter; and, after directing that the trust property should be transferred, so as that the same should become vested in herself, the two *Blenkhorns*, the Plaintiff and *Thomas Johns*, upon the trusts therein mentioned, she, in execution of the power and authority reserved to her by the indenture of the 30th of December, 1840, and the deed-poll of the 27th of April, 1842, and of all other powers enabling her in that behalf, directed and appointed that the trustees in whose names the property was directed to be transferred should stand possessed of the same in trust for such person or persons, for such interest or interests, chargeable with such sum or sums of money, and for such intents and purposes, and in such manner, in all respects, as she should, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by one witness or more, direct or appoint; and, in default of such appointment, in trust for her (*Sarah M'Lauchlan*) for life, and, after her decease, in trust, as to specific parts of the furniture and plate, for *J. A. Blenkhorn* absolutely; and as to the rest of the aforesaid furniture, jewellery, and other effects of a like nature, in trust for *Thomas Johns* absolutely; and as to the thirty-nine shares in the Gas-light and Coke Company, upon trust to pay the income thereof to *J. A. Blenkhorn* for life, and, after his decease, upon trust for the Plaintiff's daughter, *Matilda Charlotte*, absolutely; and as to all the trust premises, except those specifically disposed of, upon trust, immediately after her (*Sarah M'Lauchlan's*) decease, to sell, call in, and convert the same into money, and to stand possessed of the monies arising therefrom upon trust to pay,—first, the expenses of the sale, and of executing the trusts; secondly, to *John Blenkhorn*, 100*l*.; thirdly, to *Hannah Barnard*, 30*l*.;

fourthly, to *Catherine*, wife of *Thomas Johns*, 10*l.*; fifthly, to *John M'Lauchlan*, 10*l.*; sixthly, to *Sarah Martin M'Lauchlan*, 10*l.*; seventhly, to *William Buckell*, 100*l.*; eighthly, to a missionary society, 5*l.*; ninthly, to *Matilda Hudson*, 2*l.* 2*s.*; tenthly, to *Theresa Blenkhorn*, 2*l.* 2*s.*; eleventhly, to *Anne Barnard*, 20*l.*; twelfthly, 360*l.* in trust for the children of *David Buist*. She further gave a life interest in the two sums of 805*l.* and 450*l.* Consols to *Sophia Barnard* for life, and directed that the Plaintiff should be released from his debt of 400*l.*, part of the trust monies owing from him. And as to the residue of the trust premises, after making thereout the payments and release before directed, she appointed one moiety thereof to the Plaintiff absolutely, and the other moiety thereof to *Thomas Johns* absolutely; and she thereby declared, that, until the trust premises should be transferred to, or otherwise legally vested in, herself, the two *Blenkhorns*, the Plaintiff, and *Thomas Johns*, the trustees in whom the same were vested should stand possessed of, and interested in, the same, upon such trusts as would nearest and best correspond with the trusts thereinbefore mentioned.

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By a dead-poll, dated the 22nd of September, 1843, under the hand and seal of *Sarah M'Lauchlan*, and attested by two witnesses, indorsed on the indenture of the 1st of September, 1843, reciting, that she had determined, in exercise of the powers reserved to her, to execute the appointment thereafter contained of and concerning the monies mentioned in the indenture of the 1st of September, 1843, to arise and be produced from the sale, calling in, and conversion of the several trust premises, (after making thereout the several payments and release by the same indenture directed to be made upon her decease, and, in default or for want of any appointment by her to the contrary), one equal half part whereof was, by the same indenture, directed to be

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paid after her decease in manner therein mentioned, and the other moiety whereof was, by the same indenture, directed to be paid in manner also therein mentioned; and reciting, that she had also determined to appoint a certain picture as therein mentioned; it was witnessed, and *Sarah M'Lauchlan* thereby, in execution of her said power, directed and appointed, after her decease, all the net monies to arise and be produced under the indenture of the 1st of September, 1843, from the sale, calling in, and conversion of the trust premises (after making thereout, and subject to the several payments and release of debt directed by the indenture of the 1st of September, 1843)—as to 200*l.*, to *Thomas Johns* absolutely, and as to the residue, to the Plaintiff absolutely; and she appointed to the Plaintiff a framed and glazed picture therein mentioned. And by the same deed-poll it was also provided, that it should be lawful for *Sarah M'Lauchlan*, at any time or times, by any deed or deeds to be executed by her in the presence of and attested by one or more witness or witnesses, to revoke the same deed, and the appointments thereby made, or any part thereof; and by the same or other deed or deeds, to be executed and attested in the same manner, to make new appointments of the trust premises, or any part thereof, as she might think fit.

On the 29th of September, 1843, the two last-mentioned deeds were deposited by *Sarah M'Lauchlan* in the hands of Mr. *Cates*, her solicitor, to hold for the parties interested. On the 20th of November, 1843, in consequence of an application for the deeds, made through *Thomas Johns*, who, with his wife, resided with *Sarah M'Lauchlan*, Mr. *Cates* attended at her house with the deeds. *Sarah M'Lauchlan* was at this time seventy years of age, and in ill health. At the end of this interview, she desired Mr. *Cates* still to keep the deeds in his custody. Subsequently, another application

was made for the deeds by letter, with which, however, Mr. *Cates*, considering her to be under the influence of the persons around her, did not comply. On the 14th of February, Mr. *Helsham*, as the solicitor then employed by *Sarah M'Lauchlan*, again applied to Mr. *Cates* for the deeds; and on the 26th of February, 1844, a judge's order was obtained, directing Mr. *Cates*, within fourteen days, to deliver all the deeds in his possession belonging to *Sarah M'Lauchlan*, to Mr. *Helsham*.

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On the 28th of February, *Sarah M'Lauchlan* made her will, whereby she bequeathed to *J. A. Blenkhorn* her gas-light shares, and some articles of furniture and plate; to *W. Buckell*, 100*l.*; to *James Buckell*, the Plaintiff, 600*l.* (the 400*l.* owing from him being taken as part thereof) and the picture; *Anne Barnard*, 30*l.*; *Hannah Barnard*, 30*l.*; *John M'Lauchlan*, 20*l.*; *Sarah M'Lauchlan*, his daughter, 10*l.*; *James Helder*, 5*l.*; Foreign Missionary Society, 5*l.*; *Therza Blenkhorn*, *Mattilda Hudson*, and *Sophia Buckell*, 2*l.* each, for rings; to *Thomas Johns*, the residue of her furniture and plate; to *Catherine Johns*, her wearing apparel; to *J. A. Blenkhorn*, the 360*l.* owing from *Paxton & Co.*, in trust for the three children of *David Buist*; to *Sophia Barnard*, an annuity of 40*l.* a-year for her life: and the testatrix continued, "Whereas I have, at various times, executed deeds of settlement and appointment, and various other documents, the contents of which I have forgotten, I do hereby revoke the same, and direct my executors to procure the same to be delivered up to be cancelled;" and, finally, the testatrix bequeathed the residue of her estate to *J. Blenkhorn* and *Thomas Johns*, equally to be divided between them: and she appointed *J. A. Blenkhorn* and *Thomas Johns* executors of her will.

Sarah M'Lauchlan died on the 2nd of March, 1844,

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before any deeds had been delivered up under the judge's order. The will was proved by the executors.

The bill was filed in June, 1844, by *James Buckell*, against the other trustees and parties claiming under the several instruments. The bill, as afterwards amended, prayed that the rights and interests of all parties might be declared; an account of the trust property come to the hands of the trustees, *J. and J. A. Blenkhorn, Thomas Johns*, and the Plaintiff; and that the trust funds might be distributed amongst the parties interested under the deeds of the 1st and 22nd of September, 1843: or if the Court should be of opinion that the deeds were revoked by the will, then that the trusts of the will might be executed, and the Plaintiff relieved and indemnified in respect of the trust property vested in him under the deed.

The Defendants *J. A. Blenkhorn* and *Thomas Johns*, by their answer to the original bill, stated various applications which had been made to *Mr. Cates* for the deeds by or on the part of *Sarah M'Lauchlan*, and the death of *Sarah M'Lauchlan* before the deeds had been delivered up,—for the purpose of shewing that it was in consequence of the withholding the deeds that *Sarah M'Lauchlan* did not effectually revoke the deed-poll. The answer averred, that the said *George Cates* never delivered the said deeds, nor either of them, to the said testatrix or the said *Mr. Helsham*, but, as Defendants believed, in collusion with the Plaintiff, for whom he now acts as solicitor, retained the same in his possession until after the death of the testatrix. None of the answers of the other parties suggested any fraud or collusion. The Plaintiff and the Defendants entered into evidence. The result of the evidence appears upon the judgment. At the hearing,

Mr. Romilly and Mr. William Rudall, for the Plaintiff;

Mr. Tinney and Mr. Rogers, for the Defendant Matilda Charlotte Buckell;

Mr. Wood and Mr. Wilcock, for the Defendants J. and J. A. Blenkhorn and T. Johns;

Mr. Kenyon Parker and Mr. Leach, for the other Defendants,

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The Plaintiff relied upon the indenture of the 1st of September, 1843, and the deed-poll of the 22nd of September, 1843.

The case of the Defendants was: First, that the retention of the deeds by Mr. Cates, who was the solicitor of the Plaintiff, *Buckell*, was a fraud; and that where such fraud was committed by or for the benefit of a party entitled to property in default of appointment, the Court would supply the appointment, or treat the will as an actual execution of the power: *Middleton v. Middleton (a)*; 2 Sugden Tr. Powers, pp. 140 et seq., ed. 7.

Secondly, if no case of fraud or collusion between the Plaintiff and his solicitor should be established, then, at least, the testatrix was prevented by accident or disability from revoking the deed-poll of the 22nd of September, 1843; and the Court would treat the will as an effectual appointment, and as if the deed-poll had been revoked: 2 Sugden Tr. Powers, pp. 142 et seq., ed. 7.

Thirdly, if both the first and second ground of relief should fail, then that the will, as a writing, was a good

(a) 1 J. & W. 94.

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execution of the power reserved by the indenture of the 1st of September, 1843, so far as the trust property was not bound by the deed-poll of the 22nd of September, 1843: *Countess of Roscommon v. Fowke* (a), *Edwards v. Edwards* (b), *Douglas v. Cooper* (c).

Fourthly, that the Plaintiff was not entitled to the aid of the Court to give effect to the deeds of September, 1843, inasmuch as the same were voluntary: *Meek v. Kettlewell* (d).

In reply to the case set up by the Defendants, it was said, first, that the allegations of fraud and collusion in withholding the deeds had failed; that it was clearly the duty of the solicitor to obtain the consent of, or at least communicate with, the trustees of the deeds before delivering them up. Secondly, that, if the charge had any foundation, it ought to have been made the subject of a distinct suit. Thirdly, that, neither accident nor disability was sufficient in equity to supply the place of a due execution of the power, in the absence of any fraud. Fourthly, it was contended, that, since the late Wills Act (e), a will was not a writing within the terms of the power. There was no reported case in which it had been held that a will was a due execution of a power to appoint by deed or writing, where the writing was confined to writings sealed and delivered. Fifthly, even supposing the will to be a writing within the power, yet it could not revoke the trusts for sale contained in the indenture of the 1st of September, 1843, or the particular gifts made by that indenture before the gift of the residue, for those gifts were adopted and confirmed

(a) 6 Bro. P.C. 158 (Tom. ed.)	(c) 3 Myl. & K. 378.
(b) 3 Madd. 197; and see 1	(d) 1 Hare, 464.
Sugd. Pow. 262 et seq.	(e) 7 Will. 4 & 1 Vict. c. 26.

by the subsequent deed-poll, and were thereby rendered irrevocable except by deed; nor could it revoke the gifts of the residue, for that was disposed of by the deed-poll, and in like manner made irrevocable. *Watt v. Watt* (a) was also cited.

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VICE-CHANCELLOR:—

The object of this suit is to ascertain the rights and interests of the Plaintiff, and of the other parties in the cause, under the trusts of an indenture of the 1st of September, 1843, and of a deed-poll of the 22nd of the same month, and under the will of *Sarah M'Lauchlan*. It is admitted that the trusts of the indenture and of the deed-poll must take effect, unless and except so far as effect (if any) inconsistent with these indentures is to be given to the will of *Sarah M'Lauchlan*, made on the 28th day of February, 1844. The question which I have had to consider, is, what effect (if any) inconsistent with the indenture and the deed-poll is to be given to that will.

Judgment.

[His Honor stated the various instruments, and the other facts above mentioned.]

With respect to the defence founded on the alleged accident, (apart from fraud), which, the Defendants say, prevented the testatrix from revoking the deed-poll, and making another effectual appointment of the property, I intimated an opinion, during the argument, that the Court would not supply the execution of the power on that ground. I think the decision *Sir Edward Sugden* refers to (b), in which relief (sought on the

(a) 3 Ves. 244.

(b) Tr. Powers, Vol. 2, p. 143, ed. 7.

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ground of mere disability) was refused, of greater authority than the dicta by which it is thought to be opposed. If the argument urged before me in this case be once admitted, it seems impossible to stop short of the conclusion, that the donee of a power should in all cases be liberated from its restraints, whenever he bonâ fide intended to execute the power, but could not at a given moment ascertain what those restraints were, and death or accident prevented his compliance.

I do not find evidence of any fraud. If, indeed, there had appeared to be any attempt to withhold or conceal the contents of, or proper information respecting, the instrument, the case might be otherwise. But the whole case which has been made out amounts only to this: that Mr. *Cates* insisted on retaining the custody and possession of the deed. Upon this point, the evidence of Mr. *Cates* (if uncontradicted) is decisive; and upon looking into the answer of the Defendant *Johns*, it will appear that he states the same case. Inspection never was in question, as distinguished from the custody and possession of the deed. In the absence of any fraud or collusion, I am clear that a contest about the right custody of the deed is not enough to induce the Court to interfere with the legal effect of the instrument; and, in this case, I think there were circumstances to justify extreme caution on the part of Mr. *Cates* in parting with the custody of the deed. In coming to this conclusion, I should observe, that I have disregarded altogether the evidence of Mr. *Cates*, wherein he says, that, on the 20th of November, 1844, he offered inspection of the deed. If I had thought that material, I should have directed an inquiry, although it is very improbable that any different account of the transaction would have been elicited by such an inquiry; and the evidence of *Johns* would not have been admissible.

Next, as to the Plaintiff's letter of the 20th of November, 1844, that also goes to possession only. If he had had possession of the deed, and had refused to part with it unless with the concurrence of the other Defendants, the trustees, I should have had difficulty in inferring fraud, provided inspection and information respecting it had not been withheld. This letter, I think, cannot put the case higher. Mr. *Cates* deposes, that, to the best of his belief, at the time of seeing *Sarah M'Lauchlan* on the 20th of November, 1844, he had not received the Plaintiff's letter; and there is no other evidence bearing upon the charge of collusion.

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I now come to the question which has been raised, whether the will of *Sarah M'Lauchlan* is a writing within the terms of the power? It cannot, at this day, admit of doubt, that the will would, before the late statute, 7 Will. 4 & 1 Vict. c. 26, have been a writing within the terms of the indenture of the 1st of September, 1843, and that such will would therefore, before that statute, have been a due execution of the power reserved by that deed, provided the will had been executed with the formalities which the deed required. It was argued, however, for the Plaintiff, that, since and in consequence of that act, the word "writing" in the deed of the 1st of September, 1843, cannot be understood in the same comprehensive sense as before the passing of that act, for that the intention of the author of the deed was, that its provisions should not be altered or interfered with, except by some writing to be executed with certain formalities, which he, as the author of the deed, had a right to impose; and that this was conclusive evidence that the author of the deed could not have intended to include under the word "writing" an instrument which by law will be effectual without the observance of the

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forms which he required. I am not convinced by this reasoning. Before the Wills Act, the word "writing," in cases like the present, had received a judicial interpretation which included a will. But the Courts held that they could not dispense with the formalities prescribed by the instrument creating the power,—although they were not necessary to the validity of a will,—because those forms, being in themselves without value, could have no equivalent. Now, by the late Statute of Wills it is provided, that, in the execution of wills, one given form shall be observed, and that such form shall be an equivalent for every arbitrary form of execution which the donor of a power may prescribe. It was not at the expense, but in favor and for the benefit of such donors, and in order that their intentions might not be disappointed by the neglect of useless forms, that this legislative provision was made. I must presume, in this case, that *Sarah M'Lauchlan* made the deed of the 1st of September, 1843, with knowledge of the decisions upon the word "writing," and with knowledge also of the provisions of the Wills Act. Why, then, should I deprive her of the benefit of the act, for that is what I am asked to do? I am asked to deprive certain objects of her bounty of the gifts she intended for them, only because a form has not been observed which the legislature has declared to be useless. What reason, then, is there for saying that a will shall not, since as well as before the statute, be deemed a writing within the terms of the deed? If the testatrix had used the word "will" instead of the word "writing," the statute would equally have applied. A decision in accordance with the Plaintiff's argument would be against the spirit and policy, as well as against the letter, of the act.

Taking it, then, that the will is a good execution of the power reserved by the indenture of the 1st of Sep-

tember, 1843, the question is upon the combined effect of the deed poll and the will. Now, I agree with the Plaintiff, that the deed poll so far as it gives the residue, and (as involved in that gift) the trust to sell, are untouched by the will alone, for that appointment was revocable by deed only.

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Two questions then remain:—the first, on the construction of the deed poll; and the second, on the construction of the will. With respect to the deed poll, the question is, whether the payments and appointments preceding the gift of the residue in the indenture of the 1st of September, 1843, are repeated in the deed poll, so as to become irrevocable, except by deed. It has been argued, that the effect of the deed poll was to embody, by way of reference, and so in fact to repeat, the charges or appointments made by the prior indenture, which precede the residuary gift. I think that is not the effect of the deed poll. It appears to me that the deed poll treats these prior gifts or appointments as having been already made by the former instrument, and that, although it in that manner by reference saves them, it leaves them in other respects untouched. It remains therefore that the will can operate as an appointment only upon the dispositions in the indenture of 1st of September preceding the gift of the residue. I have no doubt that the testatrix preserved the power of dealing with the subjects of these prior dispositions by will as well as by deed. There is no practical difficulty in giving effect to this construction. If a sale were directed, and out of the proceeds, a certain sum appointed to A. and the residue to B., there could be no practical difficulty in holding that the donee of the power might by one deed change the disposition of the particular sum, and by another deed alter the disposition of the residue; and the order in which

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the deeds are executed cannot be material. I am of opinion, therefore, that the will does, or may, operate, according to its verbal construction upon the whole or any part of the trust fund comprised in the deed of the 1st of September 1843, and thereby appointed before the gift of the residue.

Looking at the frame of the bill, the answers of the trustees, and the questions in the cause—other than the question, whether, upon the ground of accident or fraud, the deed poll of 22nd of September was wholly superseded by the will—I think the costs must come out of the fund, as expenses attending the execution of the trusts of the indenture of 1st of September, 1843, for those questions have arisen out of the acts of the testatrix in the execution of the powers reserved to her by that deed. With respect to the questions raised on the case, as to the accident or imputed fraud, I shall give no costs. Omitting the charge of fraud, the state of the dicta as to accident, as a ground of equitable jurisdiction, would justify the parties in taking the opinion of the Court (a). The charge of fraud ought not in this suit to make any difference,—certainly not in favor of the Plaintiffs. It is a case in which two parties have been candidates for the fortune of a dying person, and each imputes undue influence and improper motives to the other.

Decree.

THIS Court doth declare, that the property described and comprised in the indenture of the 1st of September, 1843, in &c., became subject to the trusts therein expressed concerning the same respectively; and that the deed-poll of the 22nd of September, 1843, in &c., operated as an effectual appointment of the property thereby expressed to be appointed; and that it was not revoked by the will of *Sarah M'Lauchlan*, in &c., but that such will was a good execution of the power of revocation and

(a) See 2 Sugd. Powers, p. 156, ed. 6.

appointment reserved by the indenture of the 1st of September, 1843; and that the same is an effectual appointment of all such parts of the property described and comprised in the indenture of the 1st of September, 1843, as were not appointed by the deed-poll of the 22nd of September, 1843. And this Court doth order, that the trusts of the will, and of the deed-poll of the 22nd of September, 1843, so far as the same operated respectively by way of appointment of any property comprised in the indenture of the 1st day of September, 1843, be performed and carried into execution. And it being admitted, that the Plaintiff and Defendants *J. Blenkhorn* and *J. A. Blenkhorn* have delivered the specific chattels described in the will to the respective persons to whom the same are respectively appointed—It is ordered, that the Plaintiff, and the Defendants *J. Blenkhorn* and *J. A. Blenkhorn* do legally transfer and assign the thirty-nine shares in the Gas-light and Coke Company to the Defendant *J. A. Blenkhorn*, and receive and pay to him the dividends accrued due thereon since the death of *Sarah M'Lauchlan* deceased. And (all parties except the Defendants, the infants, waiving any inquiry with respect to the sum of 360*l.* hereinafter next mentioned with respect to the question of notice, and counsel for the infant Defendants not asking such inquiry) it is ordered, that the Plaintiff and the Defendants *J. Blenkhorn* and *J. A. Blenkhorn* do receive the sum of 360*l.* by the said testamentary appointment described as in the hands of *Paston & Co.*, and within one week from the time of the receipt thereof, (such time &c.), pay the same &c., to the credit of this cause. [Separate account of the children of *D. Beist*. Investment. Payment of the dividends and interest in the meantime. Liberty to apply.] And it is ordered, that the said Defendants *J. Blenkhorn* and *J. A. Blenkhorn* do, on or before the 6th of March next, transfer the 806*l.* Consols, standing in the names of *Sarah M'Lauchlan*, *J. Blenkhorn*, and *J. A. Blenkhorn*, into &c., to an account to be intitled "*Sophia Barnard's* Annuity Account." And it is ordered, that the Plaintiff and the Defendants *J. Blenkhorn* and *J. A. Blenkhorn* do also, on or before the 6th of March next, transfer the 450*l.* Consols, standing in the names of *Sarah M'Lauchlan*, *J. Blenkhorn*, and *J. A. Blenkhorn*, and *James Buckell*, into &c., to the said "*Sophia Barnard's* Annuity Account." And it is ordered, that the Defendants *J. Blenkhorn* and *J. A. Blenkhorn*, and the Plaintiff and Defendants *J. Blenkhorn* and *J. A. Blenkhorn*, respectively, do receive the interest and dividends which have accrued due on the said 806*l.* Consols, and 450*l.* Consols, so standing &c., since the death of *Sarah M'Lauchlan*, and which shall accrue due thereon respectively, until the said stock respectively shall be transferred as hereinbefore directed, and pay the same to the Defendant *Sophia Barnard*. And it is ordered, that the

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Plaintiff and the Defendants *J. Blenkhorn* and *J. A. Blenkhorn* do sell the 193*l.* Long Annuities, being (with the sums of 806*l.* and 450*l.* Consols, and with the 400*l.* sterling released to the Plaintiff) the residue of the trust property comprised in the indenture of the 1st of September, 1843, and receive the dividends which have, since the death of *Sarah M'Lauchlan*, accrued due thereon. And &c., the taxing-master do tax all parties (except the Plaintiff and the Defendants *J. Blenkhorn*, *J. A. Blenkhorn*, and *Thomas Johns*) the costs of this suit; and also tax the Plaintiff and the Defendants *J. Blenkhorn*, *J. A. Blenkhorn*, and *Thomas Johns*, their costs, charges, and expenses, in relation to the execution of the trusts of the indenture of the 1st day of September, 1843, and the deed-poll of the 22nd day of September, 1843, and also their costs of this suit as between solicitor and client, (except so far as their costs of this suit have been occasioned by the question in this cause, whether, on the ground of accident or fraud, the indenture of the 1st of September, 1843, and the deed-poll of the 22nd of September, 1843, or either of them, was or were wholly revoked or superseded by the will, in respect of which no costs are given either to the Plaintiff or the Defendants *J. Blenkhorn*, *J. A. Blenkhorn*, and *Thomas Johns*). And out of the proceeds of the sale of the 193*l.* Long Annuities as aforesaid, and the dividends thereon accrued since the death of *Sarah M'Lauchlan*—It is ordered, that the Plaintiff and the Defendants do make the following payments: first, it is ordered, that they do pay and retain the costs, and costs, charges, and expenses, hereinbefore directed to be taxed; And next, it is ordered, that the Plaintiff and the Defendants *J. Blenkhorn* and *J. A. Blenkhorn* do there-out purchase 88*l.* 6*s.* 8*d.* Consols, and on or before the 6th day of March, 1846, transfer the same into &c., in trust in this cause to the said "*Sophia Barnard's* Annuity Account." And it is ordered, that the dividends which shall accrue on the said several sums of 806*l.*, 450*l.* and 88*l.* 6*s.* 8*d.* Consols, making together 1343*l.* 6*s.* 8*d.* Consols, when so transferred, be, from time to time, as the same shall accrue due, paid to the Defendant *Sophia Barnard*, widow, during her life, for her sole use and benefit. And, upon her death, this Court doth declare, that the same 1343*l.* 6*s.* 8*d.* Consols, ought to be carried over to the separate account of the Plaintiff *James Buckell*. Liberty to apply upon the death of *Sophia Barnard*. And out of the proceeds of the said sale, it is ordered, that the Plaintiff and Defendants do pay the following sums, (that is to say), the sum of 100*l.* to the Defendant *William Buckell*; to *Anne Barnard*, the sum of 30*l.*; to *Hannah Barnard*, the sum of 30*l.*; to *John M'Lauchlan*, the sum of 20*l.*; to *Sarah Martin M'Lauchlan*, 10*l.*; to *James Hilder*, 5*l.*; to the Foreign Missionary Society, 5*l.*; to *Thirza Blenkhorn*, 2*l.*; to *Matilda Hudson*, 2*l.*; to *Sophia Buckell*, the wife of the

Plaintiff, 2*l.*; and to *Thomas Johns*, 200*l.*; and which said several persons are respectively named and described in the testamentary appointment of *Sarah M^cLauchlan*. And it is ordered, that the Plaintiff and the Defendants *J. Blenkhorn* and *J. A. Blenkhorn* do, out of such proceeds and dividends, pay interest on the said several sums, after the rate of 4*l.* per cent. per annum, from the 2nd of March, 1845, being twelve calendar months after the death of *Sarah M^cLauchlan*. And after making the several aforesaid payments, It is ordered, that the said *J. Blenkhorn* and *J. A. Blenkhorn* do pay to, or allow the residue or surplus of the said proceeds and dividends to be retained by, the Plaintiff for his own absolute use and benefit.

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THE testator bequeathed his residuary estate, (after certain life interests therein) to the children of his daughter *Sarah*; one of the children of the daughter married *H. Mason*. The last of the tenants for life of the estate died in 1831, and in 1834, the bill for the execution of the trusts of the will was filed by one of the children of the testator's daughter. The decree directing the sale of the estate was made in 1837. In 1839 *H. Mason* became bankrupt, and the assignees in the bankruptcy sold and assigned his interest in the residuary estate of the testator to Sir *W. Heygate*. The agreement for the sale, signed by the parties thereto, was dated the 12th of June, 1840, and was made between the assignees, of the first part, *H. Mason*, of the second part, and Sir *W. Heygate*, of the third part. The parties thereto of the first and second parts thereby agreed to sell, and Sir *W. Heygate* agreed to purchase

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A married woman entitled to a legacy, appeared by her counsel at the hearing of the cause, and claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband and wife. The husband was a bankrupt, and his assignee sold his interest in the legacy. The solicitors for the purchaser and for the wife agreed to refer the claim of the wife to their counsel; and the counsel

determined that she was entitled to a settlement of the moiety, subject to the costs. Before any further steps were taken, the wife died, leaving children:—*Held*, that the husband and those claiming under him were, by the steps which had been taken, bound to allow a settlement of part of the fund upon the wife and children; and that, upon the death of the wife, the children were entitled to the portion which would have been settled.

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(among other things) all the right and interest of the parties thereto of the first and second parts to and in the share and interest of the said *H. Mason*, or of his assignees, in the share and interest of *Sarah Mason* the wife of the said *H. Mason*, subject to the costs of the parties to the said suit, so far as such costs related to the particular property or might be decreed to fall upon the same shares and interest, to or for the price or sum therein mentioned; and it was agreed, that upon such securities for payment thereof being given as therein mentioned, the assignees should immediately execute an assignment to Sir *W. Heygate*, or as he should direct or appoint, of the said share and interest of *H. Mason*, of and in the share and interest of *Sarah Mason*, his wife, of the said residuary estate, subject to the said costs. Sir *W. Heygate* thereupon presented his petition in the cause, praying that he might be declared entitled to the share of *H. Mason* in the stock then standing, or which might thereafter be standing, in trust in the cause; and that the same might be ordered to be paid to the petitioner. The petition came on with the cause on further directions, and counsel then appeared for *Sarah Mason*, and opposed the petition, claiming a settlement for the wife and children out of the fund. The Court declared that *Sarah Mason* was entitled to one-ninth of the testator's residuary estate; and that the petitioner Sir *W. Heygate* was entitled to the share of *H. Mason* and *Sarah* his wife therein in her right, subject to her equity (if any) to a settlement; and it was referred to the Master to apportion and divide the residuary fund into nine equal shares, and one of such shares, when apportioned, was ordered to be carried over to an account to be intitled "The account of *H. Mason* and *Sarah* his wife."

After the fund had been carried to the account di-

rected by the order, the solicitors of *Sarah Mason* wrote to the solicitors of Sir *W. Heygate*, a letter dated the 23rd of November, 1843, as follows:—"Our client is willing to leave it to the junior counsel of ourselves and Sir *W. Heygate*, to tax the amount of the allowance in respect of her share,—the costs of so doing to be borne by the fund. We shall be glad to hear from you at your earliest convenience as to this." Sir *W. Heygate's* solicitors replied,—“We accede to your proposal on behalf of Sir *W. Heygate*. Our junior counsel shall be instructed on the subject.” On the 1st of December, 1843, the counsel of both parties consulted on the point, in pursuance of instructions from their respective clients, and they agreed that if there were no special circumstances in the case, one half of the fund was the proper proportion to be settled on Mrs. *Mason*; but they required to be informed, whether there had been any settlement made on Mrs. *Mason*, whether *H. Mason* had ever appropriated other property of Mrs. *Mason* to his own use, and whether his wife was maintained by him. Upon information on these points being furnished, the counsel of both parties concurred in the following opinion or decision: “We think, that, under the circumstances of this case, a moiety of the fund directed by the order on further directions to be carried over to the account of *H. Mason*, and *Sarah* his wife, after deducting therefrom the costs of and incidental to Sir *W. Heygate's* petition, and of the necessary applications for getting the fund out of Court, ought to be settled on Mrs. *Mason* and her children.” This opinion was written on the 3rd of January, 1844; on the 7th of January, *Sarah Mason* died.

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A petition was now presented by the children of Mrs. *Mason*, (who were all of age), praying that the costs of *Sarah Mason* and Sir *W. Heygate* deceased, and also of

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the executors of Sir *W. Heygate*, (he having also died in the interval), and of the petitioners, of and incidental to the matters mentioned in the petition, might be taxed; that the fund standing to the account of *H. Mason* and *Sarah* his wife, might be sold, and such costs, when taxed, might be paid thereout; and that of the residue of such proceeds, one moiety might be divided between the petitioners, and the other moiety paid to the executors of Sir *W. Heygate*.

Argument.

Mr. *Rolt*, for the petition, contended that *Sarah Mason* had in her lifetime sufficiently declared that she required a settlement of so large a portion of the estate as the rules of the Court would give her; and that the trust property had thereby become bound as effectually as if the Master had approved of a settlement on her behalf. *De la Garde v. Lempriere* (a), *Steinmetz v. Halthin* (b), *Groves v. Clarke* (c), *Murray v. Lord Elibank* (d).

Mr. *Tripp*, for the executors of Sir *W. Heygate*, argued that the wife's equity to a settlement did not attach upon the property until some order had been made by the Court affirming her right; and that after her death the children could not insist upon such equity. *Lloyd v. Williams* (e), *Fenner v. Taylor* (f), *Adams v. Lavender* (g).

August 1st.

VICE-CHANCELLOR:—

Judgment.

This is the petition of seven individuals, representing themselves as the only children of *Sarah Mason*, the

(a) 6 Beav. 344.

(b) 1 Gl. & Jam. 64.

(c) 1 Keen. 132.

(d) 10 Ves. 84.

(e) 1 Mad. 450.

(f) 1 Sim. 100; S. C. 2 R. & Myl. 190.

(g) 1 M'CL. & Y. 41.

wife of *Horatio Mason*, a bankrupt. The object of the petition is, that they may be declared entitled among them to a sum of money, being one moiety of their mother's interest under the will of the testator in the cause. The ground of the claim is, that the mother was entitled under the common equity to a settlement, and that the fund in question is bound by the proceedings in the cause. If, in order to decide this case, an obligation had been imposed upon me, of deciding between the conflicting opinions of Sir *John Leach* and Lord *Langdale*, I should certainly have taken a great deal of time to consider the matter. But I may, I think, decide the case without expressing an opinion upon that point; and the only observation which it will be necessary to make is this: it appears that the question, whether the children can, after the death of their mother, insist upon her equity to a settlement, depends not upon the question whether the mother was bound, but upon the question whether the husband was bound. It is clear that an order, referring it to the Master to approve of a settlement, binds the husband though it does not necessarily bind the wife. There may be a case in which the wife is not absolutely bound, but in which, as against the husband, the children are entitled to the benefit of the mother's equity. If the husband is bound, the children are certainly entitled. The question whether the husband is, or is not bound, must be governed by the ordinary principles of the Court. Where a decree is made for the Plaintiff he may waive the decree, but the Defendant is bound by it; but the mere filing a bill to enforce a right, does not necessarily bind him. The facts of the present case are these: [His Honor stated the facts of the case,—the gift by the will of the testator,—the suit,—the bankruptcy,—the sale of the bankrupt's interest in the pro-

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perty,—and the subject of the petition, which came on at the hearing for further directions.] Upon the petition coming on, and on the hearing on further directions, counsel appeared for Mrs. *Mason* and opposed the petition, on the ground that she and her children were entitled to a settlement out of the fund. Whether an order to appear specially for that purpose was ever obtained does not appear. She did, however, appear by her counsel, and asked that her share of the fund might not be paid out without a proper settlement being first made upon her and her children. The Court by its decree declared that *Sarah Mason*, was entitled to one-ninth of the testator's residuary estate, and that Sir *W. Heygate* was entitled to the interest of *Horatio Mason* and *Sarah* his wife therein, subject to her equity, if any, to a settlement; and an order was made to divide the fund constituting the residue into nine equal shares. Without expressly deciding the point, it certainly appears to me that that order might alone have been sufficient to decide the question. If an order referring it to the Master to approve of a settlement had been made at the same time, there would have been no question about it; but, as it stands, the wife might possibly not have been entitled to any settlement at all. The fund might have been under 200*l.*, or the husband might have made such a settlement upon his wife, as to have become the purchaser of her interest in the fund. The Court, however, has ordered the fund to be carried over to a separate account, and declared that the interest of *H. Mason*, and *Sarah* his wife therein in her right, subject to the wife's equity to a settlement (if any) belonged to the petitioner. The fund has been carried over in the way directed by the order, and it was then quite of course for Mrs. *Mason* the day after, to have presented a petition praying conditionally, at least, a reference to

the Master to approve of a settlement; and if that had been done, there is no question, upon the authorities, but that the fund would have been bound. [His Honor then stated the proceedings which took place between the solicitors and counsel of both parties to adjust their respective claims.] The case therefore stands thus:—the fund having, on the application of Mrs. *Mason*, been carried over to a separate account subject to her equity (omitting the words “if any” and she being in a condition to ask for the common order for a reference to the Master, instead of taking that course, proposed to Sir *W. Heygate*, that third parties should determine the amount of her claim, to which Sir *W. Heygate* acceded. It appears to me impossible that those who claim under Sir *W. Heygate*, can now be allowed to retire from that agreement, if the effect would be to deprive Mrs. *Mason* and her children of the equity which the agreement of Sir *W. Heygate* conceded. It appears to me therefore, that the children are entitled in equity to the fund which they would have derived under the settlement. There must be an inquiry to ascertain who are the children of Mrs. *Mason*.

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GIBSON v. INGO.

An order made at the hearing, that the cause should stand over, with leave to amend by adding proper parties, and apt words to charge them, or to shew that other parties are not necessary, or to file a supplemental bill,—does not entitle the plaintiff to introduce by amendment any charge against the original defendants, which is not necessary to explain the amendment.

AN objection, that *Joseph Hopper* was a necessary party to the suit, was taken at the hearing; when the cause was ordered to stand over, with liberty to the Plaintiff to amend the bill by adding proper parties thereto, with apt words to charge them, or to shew that *Hopper* was not a necessary party to the suit, or with liberty to file a supplemental bill.

The Plaintiff amended the bill, by making *Hopper* a party, and charging, that he “sometimes claims an interest in the matters aforesaid, or some of them, and he sometimes claims to recover from the Plaintiff some considerable sum of money by way of demurrage or damages in the nature thereof, for the detention of the said ship or vessel in consequence of the certificate of registry being detained by the other Defendants, *R. Carter, J. Bonus, and G. Simpson.*” And the Plaintiff then added, by amendment, the following charge:—
“that the three last-named Defendants are liable to the Plaintiff for such sum as the Plaintiff is or may be liable to pay to the said *Joseph Hopper* for damages as aforesaid.”

Argument.

Mr. *Chandless*, for the Defendants, *Carter, Bonus, and Simpson*, moved that the amended bill might be taken off the file, on the ground that the terms of the order, at the hearing, giving leave to amend, did not permit the plaintiff to introduce any charge as a foundation for relief against the original Defendants, which was not sought by the original bill.

Mr. *Romilly* and Mr. *Heathfield*, for the Plaintiff, submitted that the charge complained of was necessary in order to connect the case as against *Hopper*, the new

Defendant, with the case against the original Defendants, and to prevent an objection to the amended record on the ground of multifariousness; and that the original Defendants could not be prejudiced by the allegation, inasmuch as the Plaintiff would have been entitled to the relief it pointed to, under the prayer for general relief. They cited *Milligan v. Mitchell* (a).

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Argument.

VICE-CHANCELLOR:—

Judgment.

The question at the hearing of a cause, upon an objection for want of parties, is, whether the Court, as against the Defendants who are before the Court, can give the relief which the Plaintiff asks, in the absence of those who are suggested to be necessary parties; and when liberty is given, in that stage of the cause, to amend the bill by adding parties, the purpose of the order is, to enable the Plaintiff to bring the cause to the hearing without any variation of the case against the original Defendants,—to try the same case in the presence of the necessary parties. Under such an order as was made in this case, the Plaintiff may amend the bill, either by shewing why the person, whose absence is objected, is not a necessary party, or, if he be made a party, by inserting such charges (if any) as may be necessary to shew him why he is so made a party. In this case the Plaintiff has made *Hopper* a party, and has then gone on to charge that the original Defendants are liable to the Plaintiff for whatever the Plaintiff may be liable to *Hopper*. Such a charge may be necessary to enable the Plaintiff to recover against the old Defendants, but not to make their case against *Hopper*. It is said, that this is a result of the facts stated,—that it is only a conclusion of law, and that it is a relief to which the Plaintiff is entitled under the prayer

(a) 1 Myl. & Cr. 511.

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for general relief. Whether the prayer for general relief would or would not, in the circumstances of the case, comprehend the relief adverted to in this charge, without the bill containing the charge, is a question which I cannot try without hearing the cause; and the Court is not now to hear the cause for the purpose of ascertaining such a point. The charge, I may observe, must be either immaterial or improper; for if the charge has no effect which the general prayer would not have had, there is no necessity for introducing it; and if it has any new effect, not embraced in the case originally made, the defendants ought not to be subjected to it. The charge may possibly point to an alternative case, which may require a different defence and a new answer. I think the passage ought to be expunged.

Order. ORDER, that the words (in italics) be expunged from the amended bill, and that the Plaintiff do pay the costs of the motion.

12th & 14th
 November.

WOOD v. MACHU.

Reference as to title, directed on motion after answer to a bill for specific performance by the vendor

against the purchaser, notwithstanding the purchaser stated that his requisitions on the abstract had not been complied with, although the time for completion of the contract had long expired, and he had given notice of his intention to rescind the contract.

Objections to title mean such objections as can only be properly the subject of adjudication upon the investigation of the title; and such are cases where the dispute is as to the application of the conditions of sale, the propriety or validity of the conditions themselves not being questioned.

The purchaser cannot, owing merely to the delay of the vendor in complying with his requisitions, determine the contract without notice, or bring an action for his deposit before the termination of his notice, where time was not originally of the essence of the contract. Whether he can do so after the expiration of notice, where time has not been made of the essence of the contract, or, being of the essence of the contract, has been waived, depends upon the conduct of the vendor after notice.

The estate was offered for sale by auction on the 11th of December, 1845. By the conditions of sale the purchase was to be completed by the 25th of March, 1846, and interest was to be paid on the purchase-money, if from any cause the payment was delayed beyond that time. The abstract was to be delivered within twenty-one days, and if no objections to the title were made within fourteen days after the delivery of the abstract, the title was to be deemed to be accepted. One of the conditions of sale contained special provisions with regard to the evidence which the purchaser should be entitled to require, and of which he should bear the expense. The abstract was delivered by the vendor, and the objections by the purchaser were made, within the stipulated time. The answer stated, that none of the requisitions had been satisfactorily complied with: that, on the 21st of February, 1846, the Defendant's solicitor had sent a draft of a conveyance of the property to the vendor, without prejudice to the requisitions then pending, that the draft had been returned on the 23rd of February, approved, except in some unimportant particulars, accompanied by a letter; and that a correspondence between the solicitors of the vendor and purchaser respecting the title had continued until the 24th of March, 1846. The answer stated, that, on the 24th of March, the solicitor of the purchaser wrote to the solicitor of the vendor, to the effect, that if the required evidence were not furnished within fifteen days from that date, his client would consider the contract at an end. Some further correspondence afterwards took place: and, on the 3rd of June, the purchaser's solicitor again wrote to the solicitor of the vendor, stating the advice which he had received as to the evidence to which the purchaser was entitled, and concluding, "I must, therefore, again give you notice, that, unless you evidence your client's pedigree within fourteen days from the date hereof, I

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shall be under the necessity of commencing legal proceedings to recover back the deposit with interest and costs." On the 5th of June, the purchaser's solicitor again wrote to the solicitor of the vendor, "I have to acknowledge the receipt of your letter of the 4th instant, in reply to mine of the 3rd, to which I beg leave to refer; and although it may be unnecessary to give you any further or more formal notice on the subject, merely for the sake of regularity, I take leave to state, that unless you evidence your client's pedigree, in every respect required by my said letter, on or before the 20th of June instant, I shall treat the contract as abandoned, and bring an action to recover back the deposit-money, with interest and costs." Two other letters, one of the 12th and the other of the 15th of June, passed between the solicitors. The Defendant, by the answer, reserved to himself the right, if necessary, of taking further objections to the title.

The purchaser commenced an action for the recovery of the deposit, on the 18th of June; and on the 3rd of July, the bill was filed by the vendor to restrain the action, and for specific performance of the contract.

Argument.

Sir *Francis Simpinson* and Mr. *W. Rudall*, opposed the motion. They submitted that this was a case in which a material question was raised on the liability of the Defendant to perform the contract; and the question of title did not therefore arise until that of contract had been determined: *Page v. Adam* (a).

Judgment.

VICE-CHANCELLOR,—(after stating the facts of the case, and holding, that, supposing time to have been

originally of the essence of the contract, it was waived by the correspondence or dispute between the parties or their solicitors respecting the title, after the time fixed by the conditions of sale for the completion of the contract, namely, the 25th of March, and down to the month of June, 1846), proceeded:—

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The Defendant insists, that his answer shews a defence other than as to the title, and that the Court cannot dispose of that before the hearing; or, in other words, that no reference can regularly be made upon this motion. The Defendant is right in saying, that if there is a defence other than upon the title, no reference should be directed; and there is even authority for saying, that although the alleged defence be frivolous, it will be an answer to the motion. That, however, has not been the practice, at least since the case of *Withy v. Cottle* (a). Since the decision in that case, the practice of the Court has been, to look into the answer for the purpose of seeing whether that which the Defendant calls an objection to performing the contract is an open question. A point raised by the answer, as an objection other than to the title, may be so surrounded and governed by authority, as, in fact, to create no difficulty, and to be, in effect, frivolous; and in that case the Court does not yield to the objection by refusing the reference. Such, certainly, is the result of my own experience; and it appears, by a late case, to be that also of another judge of much greater experience: *Boyes v. Liddell* (b). But, however that may be, this, at all events, is clear, that the Court must look into the answer for the purpose of seeing whether the objection be or be not an objection to title. By objection to title in these cases, I understand that which can only become properly the

(a) T. & R. 78.

(b) 1 Y. & C. C. C. 133.

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subject of adjudication upon the investigation of the title. If the conditions of sale, so far as they impose conditions respecting the title, had been objected to, that might have been an objection to be disposed of before reference. But if (as in this case) the conditions are admitted to be proper, and the only question is as to the application of those conditions, it is only in the investigation of the title that the matter in dispute between the parties can properly be adjudicated upon. I might, indeed, give an opinion upon the points which in this case have become actually subjects of dispute; but whilst it is open to the defendant—as he contends by his answer it is—to raise further objections, it is impossible for the Court usefully to entertain the question. I cannot agree with Sir *Francis Simphinson*, that the nature of the conditions make the question other than one of title.

The only other case made is this:—In a case in which time originally was not of the essence of the contract, and in which the parties, after the day fixed by the contract for its completion, have gone on with discussions on the title without interruption, the purchaser, on the 18th of June, and without previous notice applicable to that day, declares the contract at an end by bringing an action for the deposit. That this cannot be done, has been so repeatedly and solemnly decided, that, in the simple case this answer presents, I am prepared to say it is not an open question.

It is unnecessary that I should give any opinion what my judgment would have been, if the action had not been brought until after the 20th of June; but I do not think that it would have been different. The reference must be directed as to the title, with the addition, in this case, that the Master must have regard to the conditions of sale.

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ALLEN v. ANDERSON.

*January 20th
and February
13th.*

THE testator, *William Anderson*, by his will, dated in February, 1810, after giving to his wife, *Ann Anderson*, certain specific and pecuniary legacies, gave, devised, and bequeathed unto his wife, and to *H. Davidson* and *H. Deffell*, their heirs, executors, and administrators, all the rest and residue of his real, personal, and mixed estate and effects, whatsoever and wheresoever, which he might be seised or possessed of, or entitled to, at the time of his decease, upon trust to sell and convert into money all such parts thereof as should not consist of money, or be invested in government or real securities; and after discharging all his just debts, and funeral and testamentary expenses, to invest the produce of his said estates, and stand possessed of so much thereof as, together with a certain sum secured by the settlement on his marriage, should be equal to a moiety of his real, personal, and mixed estate, upon trust to pay the interest and dividends thereof unto his wife and her assigns, during her life or widowhood, and, subject as aforesaid, upon trust, as to so much thereof as, together with the sum comprised in the said marriage settlement, should be equal to a fourth part of his said real, personal, and mixed estate, in trust for such one or more of his child or children as his said wife should direct or appoint; and as to all the rest, residue, and remainder of his real, personal, and mixed estate and effects, and the produce thereof which should remain after answering the several purposes, including such part thereof as his wife might not happen to appoint, and also including the stocks, funds, and securities, the income whereof was given to or for the benefit of his wife as aforesaid, from and immediately after she should

The testator, who was a Scotchman, domiciled in England, devised all the rest and residue of his real, personal, and mixed estates and effects, whatsoever and wheresoever, which he might be seised or possessed of or entitled to at the time of his decease, upon trust for his children, in certain shares. One of the children being the heir-at-law of the testator, became entitled, according to the law of Scotland, to a heritable bond made by a debtor of the testator, after the date of the will, and given as a security for a debt, which was owing to him at the time the will was made:—

Held, that the heir was not a trustee of the heritable bond for the executors of the testator, and that he was not bound to elect between the heritable bond and the benefits to which he was entitled under the will.

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cease to be entitled thereto, the testator gave and bequeathed, and directed that his said trustees should stand and be possessed thereof, in trust for all and every his child or children then living, or thereafter to be born, equally to be divided amongst them, the interests therein to be vested in his sons at the age of twenty-one years, and his daughters at that age or marriage; and if but one such child should live to attain a vested interest as aforesaid, then he directed that the whole should be in trust for that one child. The testator appointed his wife, and *H. Davidson* and *H. Deffell*, executrix and executors of his will.

The testator made a codicil to his will, dated in May, 1816, and thereby devised all the freehold hereditaments, whatsoever and wheresoever, of or to which he was become seised, possessed, or entitled, since the date of his will, upon the trusts of the will.

The testator made a further codicil in June, 1823, and thereby revoked the devise and bequest in the former will and codicil to his wife, and *Davidson* and *Deffell*, and devised and bequeathed all his freehold estates, whatsoever and wheresoever, to the same executrix and executors, and *E. Barkly*, upon the trusts expressed in the will. By a last codicil, made in December, 1824, the testator devised to the same trustees a piece of land which he had subsequently purchased, upon the same trusts.

By a deed or trust disposition, dated the 20th of June, 1823, executed according to the law of *Scotland*, the testator conveyed certain lands and estates in the county of *Cromarty*, in *Scotland*, to the said trustees of his will, upon trust to sell the same, and stand possessed of the proceeds as part of the personal estate bequeathed

by his will. The testator died in 1825, leaving his widow, and *Henry Anderson*, his eldest son and heir-at-law, and seven other children. The executrix made a distribution of some part of the estate among the children. A part of the property of the testator, at the time of his death, consisted of a heritable bond or security upon an estate in *Scotland*, for the sum of 6000*l*. This bond or security was afterwards paid off, and the sum of 6000*l*. due thereupon was received by *Henry Anderson*, as the heir-at-law of the testator.

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Henry Anderson, the heir-at-law, in 1831, assigned to the Plaintiff part of his interest as one of the children of the testator in the trust fund, which, under the will of the testator, would be divisible on the death of the widow. The widow died in 1843. The Plaintiff then claimed payment of the trust fund assigned to him, when his claim was met by the objection, that the monies received by *Henry Anderson*, including the 6000*l*. paid in respect of the heritable bond, exceeded his share of the testator's estate; and that the 6000*l*. must be brought into account before any claim through him, upon that estate, could be recognised by the executors. The bill was thereupon filed for an account of the residuary estate of the testator, and payment out of *Henry Anderson's* share of the sum assigned to the Plaintiff.

The executors submitted, that *Henry Anderson* was bound to elect either to keep the money which had been paid to him in respect of the heritable bond, and abandon his interest under the will, or to bring into hotchpot the 6000*l*., and take his share of the residuary estate of the testator.

The facts either proved or admitted at the bar were, that the testator was a native of *Scotland*, and, at the

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time of making his will and codicils, was a merchant in London, and domiciled there; that the debt of 6000*l.*, or a great part thereof, secured by the heritable bond, was owing to the testator at the time he made his will; but that the security of the heritable bond was not given until after the will and codicils had been executed.

Argument. Mr. Wood and Mr. W. M. James, for the Plaintiff, argued that there was nothing in the will to put the heir-at-law to his election: *Johnson v. Telford* (a), *Dummer v. Pitcher* (b).

Mr. Tinney, Mr. Romilly, Mr. Bigg, and Mr. Oliver, for the several Defendants, contended that there was a sufficient intimation of the intention of the testator to divide his whole property amongst his family, and to give it to his executors for that purpose. There was no language which he could have used, at the date of his will, more effectually calculated to express that intention, than the words which the testator had used. They cited *Churchman v. Ireland* (c), *Brodie v. Barry* (d) *Blunt v. Clitherow* (e), *Shuttleworth v. Greaves* (f), *Pettward v. Prescott* (g); and also adverted to other cases, which are mentioned in the judgment.

Feb. 13th.
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Judgment.

VICE-CHANCELLOR :—

The testator, by his will, dated the 17th of January 1810, after giving to his wife certain specific and

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| (a) 1 Russ. & Myl. 244. | (d) 2 Ves. & Bea. 127. |
| (b) 2 Myl. & K. 262; S. C., | (e) 10 Ves. 589. |
| 5 Sim. 35. | (f) 4 Myl. & Cr. 35. |
| (c) 1 Russ. & Myl. 250. | (g) 7 Ves. 541. |

pecuniary legacies, devised and bequeathed to trustees all the rest and residue of his real, personal, and mixed estate and effects, which he might be seised or possessed of or entitled to at the time of his decease, upon trust to convert the same into money, and stand possessed of the residue (subject, as to part, to a life interest to his widow) upon certain trusts for the surviving children of the testator.

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On the 20th of June, 1823, the testator executed a trust deed, whereby certain property was vested in trustees, upon trust to sell and hold the proceeds as part of his personal estate. I understand it to be admitted that this deed was executed before the testator became possessed of the heritable bond; and that the bond was not therefore affected by it. The testator made three codicils to his will, but none of these affect the question in the cause. The testator died in 1825.

At the time of his death, the testator was the holder and obligee of a Scotch heritable bond, given after the date of the will, and of the deed which I have referred to, for securing a debt of 6000*l.* The testator was by birth a Scotchman, but his domicile was English, and the bond was given to secure a mercantile debt contracted in the city of *London*. He had eight children, of whom *Henry*, the eldest, became, according to the law of *Scotland*, entitled to the heritable bond as the heir of his father; the will under the circumstances being inoperative to pass any interest in real estate in *Scotland*. The Plaintiff is entitled, by purchase from *Henry*, to such interest as he had in the bond, and under the will of the testator. The Defendants represent the interests of the remaining children.

Two questions were raised by the Defendants:—

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First, it was said that the interest of the testator in the heritable bond would be governed by the law of his domicile, and that *Henry*, the heir, would be a trustee of the bond for the parties entitled to the personal estate of the testator. Secondly, that *Henry* ought, under the terms of the will, to be put to his election, and that he could not take the bond as heir, and at the same time claim the benefit of the bequests made by the will in his favour.

Both of these points appear to me to be governed by authority. As to the heritable bond, the case of *Drummond v. Drummond*, cited by Sir *William Grant* in *Brodie v. Barry* (a), is a decision on the point. That case was the converse of the one now before me; but the principle of that case is based on the same rule of law as that relied upon by the Defendants in support of the proposition, that the heir would be a trustee for the next of kin. The case of *Johnstone v. Baker* (b), cited in *The Duchess of Buccleuch v. Hoare*, appears to some extent an authority also; as was also the judgment of Sir *Thomas Plumer* in the case of *The Duchess of Buccleuch v. Hoare* (c). But I think the case of *Jerningham v. Herbert* (d) is an express authority in favor of the Plaintiff.

As to the question of election, it occurred to me that two questions might have been argued in the Defendants' favour: first, omitting the effect of the deed of the 20th of June, 1823; and secondly, taking that deed into account. Omitting the effect of the deed, it appears to me that if the point were not ruled by authority, the only question would have been,

(a) 2 Ves. & Bea. 127, 132.

(c) 4 Madd. 467.

(b) 4 Madd. 474, n.

(d) 4 Russ. 388.

whether the words of the will were large enough to describe the bond; and to shew that the words of the will were large enough to comprehend the bond, I should not probably have thought it necessary to go beyond the case of *Churchman v. Ireland* (a). The cases in which it has been held that a testator devising his estates is not to be understood as devising land of which he was the tenant in tail, (*Pole v. Lord Somers* (b)), or copyholds not surrendered to the uses of the will, (*Judd v. Pratt* (c)), or property of which he was the joint owner with another, (*Dummer v. Pitcher* (d)), appear to have proceeded upon the ground that the property is not the testator's property in the strict acceptation of the term, and that therefore the words of the will do not describe it, if the testator had any property of his own to satisfy the words of the will. Those cases are analogous to the decisions respecting property subject to a power of appointment (e).

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But, whatever opinion I might have formed in the absence of authority, I feel bound in the case before me by authority. Not relying upon the case of *Johnson v. Telford* (f), I feel bound by the previous authorities upon this point. The question, as Sir William Grant observes in *Brodie v. Barry*, is to be answered by considering what law is to govern the case; and, as he observed in that case (without approving the decision), the cases up to that time had established that the question was to be governed by English law, and that in applying the English law to the case, the Court would deal with real interests in Scotland as it would with copyholds in England. Now, as a general devise of all "my real

(a) 1 Russ. & Myl. 250.

(d) 2 Myl. & K. 262.

(b) 6 Ves. 309, 319, per Lord Eldon.

(e) See Wigram on Wills, p. 18, Notes, ed. 3.

(c) 13 Ves. 168.

(f) 1 Russ. & Myl. 244.

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estate in *England*" would not have the effect either of a devise or of a declaration of uses of copyholds not surrendered to the uses of the will, so in the case of Scotch lands, a devise of all his real estate by a testator would not have the effect by way of devise or declaration of uses of lands in Scotland which had not been previously conveyed in such manner as to allow the will to operate upon them. Omitting, therefore, the effect of the deed of January, 1823, it appears to me that the reasoning of Sir *William Grant* in *Brodie v. Barry* (though opposed to his private opinion) shews that this is not a case of election.

With regard to the deed, if it had any operation upon the heritable bond, the case of *Bennett v. Bennett's Trustees* (a), and the cases cited in *Brodie v. Barry*, might have materially altered the case; but I understand it is admitted that that deed has no effect upon the present question.

There must be a decree for payment of the fund, with interest,—I cannot make the heir pay all the costs of establishing his right. The costs should have come out of the shares of all the other parties. The justice of the case as to costs would be for the executors to be paid their costs by the Plaintiff, and the Plaintiff to recover them over against the other parties; but I cannot make that order in this suit.

(a) Robertson on the Law of Personal Succession, 227.

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PRENDERGAST v. LUSHINGTON.

24th & 26th
January.

THE suit was instituted by the widow of the testator in the cause, for the purpose of obtaining for the trustees the direction of the Court as to the manner in which the trusts of the will ought to be carried into execution. After directing his debts and funeral and testamentary expenses to be paid, and giving certain specific legacies, including his furniture, leasehold residence, and household effects to the Plaintiff, his widow, the testator proceeded:—"I give and bequeath to my trustees hereinafter named so much of my personal estate and effects as at the time of my decease shall produce the clear annual income of 1500*l.*; and I direct that the same shall be selected, and be appropriated and set apart, so soon as conveniently may be after my decease, by my said trustees, or the trustees or trustee for the time being, or the majority of them residing in *England*, in their uncontrolled discretion; and I direct that my said trustees, and the trustees or trustee for the time being under this my will, do and shall stand and be possessed of the personal estate and effects so to be appropriated and set apart, upon trust to pay the interest, dividends, and annual produce thereof, by equal half-yearly payments, unto my said dear wife during her life, if she shall so long continue my widow, the

The testator gave to the executors and trustees appointed by his will so much of his personal estate as would produce a certain annuity, upon trust to select, appropriate, and set apart the same, in their uncontrolled discretion, and pay the interest, dividends, and annual produce thereof to his widow for her life or widowhood; and if the annual produce of the personal estate and effects so set apart and appropriated should from any cause be increased or reduced, his widow was to receive such increased or reduced interest, dividends, and annual produce; and, from and after her decease or second

marriage, the testator directed that the personal estate and effects so appropriated or set apart should fall into his residuary estate. And the testator empowered his trustees, at their own discretion, to permit the whole or any part of his personal estate to remain on the securities on which the same might happen to be at his decease, or otherwise to convert and alter the same at their own absolute discretion. The testator's personal estate was invested in foreign funds. The trustees did not exercise their discretion as to the appropriation of the investments to answer the annuity, but submitted to act as the Court should direct:—*Held*, that the Court would not direct any appropriation of the foreign funds to answer the annuity to the widow, but would direct the annuity to be raised by the purchase of Consols, referring it to the Master to inquire what part of the existing investments it would be proper for that purpose to call in, having regard to the interests of other parties under the will.

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first of such half-yearly payments to begin and be made at the end of six calendar months next after my decease, and from and after the decease or second marriage of my said wife, I direct that the personal estate and effects which shall be so appropriated and set apart, or the stocks, funds, or securities in or upon which the same shall then be laid out or invested, shall sink into and become part of my residuary personal estate; and I direct, that, in case the yearly interest, dividends, and annual produce of the personal estate and effects so to be appropriated and set apart as aforesaid, or the stocks, funds, or securities in or upon which the same shall or may at any time or times hereafter be laid out or invested, shall from any cause whatever be increased or reduced in amount during the time the same are hereby directed to be paid to my said wife, then and in such case my said wife shall be entitled to have and receive such increased or reduced interest, dividends, and annual produce, as the case may be, in lieu or satisfaction of the interest, dividends, and annual produce hereinbefore directed to be paid to her." The testator then bequeathed the whole of his residuary estate to his trustees, upon trust to divide the same equally among his children who should be living at his decease, as therein mentioned. In a subsequent part of his will, the testator declared that it should be lawful for, and he thereby expressly authorised and empowered, his said trustees, and the trustees for the time being of his will, or the majority of them resident in *England*, at their own discretion, to permit the whole or any part of his personal estate to remain and continue on such securities as the same might happen to be invested at the time of his decease so long as they should see fit, without being in any way answerable or responsible for so doing; nevertheless he thereby fully authorised and empowered his said trustees or trustee for the time being,

or the majority of them resident in *England*, to sell and absolutely dispose of or convert into money such part or parts of his personal estate and effects as should not consist of money, or securities for money, and call in, recover, and receive such part or parts of his said personal estate and effects as should consist of money or securities for money, when and as they should in their discretion think fit, and to lay out and invest the money so to be raised and received in the public stocks or funds of *Great Britain*, or on government or real securities, at interest; and from time to time to alter, vary, and transpose the stocks, funds, and securities in or upon which the same should or might be laid out and invested, and again to re-invest and lay out the money arising thereby upon any new or other or like stocks, funds, or securities, as they should in their own absolute discretion think fit or advisable; and, generally, to act in the premises in as full and ample a manner as he (the testator) could do were he living.

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The will was made in 1839, and ratified by a codicil in 1840. The testator died in 1845.

At the time of the death of the testator, nearly the whole of his personal estate was invested in the foreign stocks and funds specified in the first column of the following table:—

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<i>Stocks or Funds.</i>	<i>Price per Cent.</i>	<i>Probable Value.</i>			<i>Interest on those paying Interest.</i>		
		£	s.	d.	£	s.	d.
21,000 dollars in Mississippi 6 per cent. stock . . .	48 or 50	2,263	0	0			
22,000 dollars in Pennsylvania 5 per cent. stock . . .	68	3,366	0	0	220	0	0
20,000 dollars in Maryland 6 per cent. stock . . .	63	2,835	0	0			
24,000 dollars in Louisiana 5 per cent. bonds, redeemable in 1853 . . .	70	3,780	0	0	270	0	0
85,000 dollars ditto, redeemable in 1867 . . .	60	11,475	0	0			
40,000 dollars in New Orleans City 5 per cent. bonds . . .	60	5,400	0	0			
24,000 dollars in Alabama 5 per cent. bonds . . .	62	3,348	0	0	240	0	0
11,000 <i>l.</i> in Alabama sterling bonds . . .	74	8,140	0	0	550	0	0
5000 <i>l.</i> in Upper Canada debentures . . .	100	5,000	0	0	250	0	0
40,000 <i>l.</i> in Converted Portuguese 5 per cent. bonds . . .	66 or 68	26,400	0	0	1200	0	0

The common inquiries in an administration suit were directed at the hearing, and the Master was also directed to inquire whether such parts of the testator's estate as were then outstanding and invested in any foreign stocks and securities, or any and what part thereof, ought to be sold. Affidavits were laid before the Master, stating the market price of the several stocks in July, 1845, (the time of the inquiry), their probable value if sold, and the interest produced by those which at that time paid interest. One of the witnesses, an American stock agent, deposed, that, in his opinion, it would not be for the benefit of the general personal estate of the testator that the American secu-

rities should be sold; that there was good reason to believe the payment of interest would be resumed on several of those stocks which were not then paying interest; and that they could not at present be sold except at a price much below their real value. The result of the affidavits is stated in the second, third, and fourth of the above columns. The Master being of opinion that all the foreign funds ought to be sold, the parties waived his report on the special inquiry, and raised the question on further directions on the general report.

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Mr. *Romilly* and Mr. *Tennant*, for the Plaintiff, submitted, that the Court would not direct any appropriation of the existing securities which would leave the annuitant dependant upon the foreign funds, the payment of which might be interrupted by war or other casualties; but that she was entitled to a sale of a sufficient part of the foreign stock to produce her annuity in the British funds, without reference to the question of depreciation as affecting the general estate.

Argument.

Mr. *Tinney* and Mr. *McNaghten*, for residuary legatees, contended that the gift to the widow was a specific bequest, or in the nature of a specific bequest, and that the widow was bound to take it in the state in which it was left by the testator. The widow was not entitled to call upon the Court to exercise the power vested in the trustees, of converting the investments left by the testator. He evidently contemplated that his widow's annuity would be derived from fluctuating sources, when he provided that she should be entitled to the benefit of a rise, as well as suffer from a fall in the income which it produced. The effect

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would be to take from the children,—the residuary legatees, a part of the property specifically bequeathed to them by the testator. The case of *Buxton v. Buxton* (a) was mentioned.

Mr. C. M. Roupell, for the trustees.

Mr. Romilly, in reply, denied that the bequests were specific: they would not have been adeemed if the testator had sold the foreign stock in his lifetime. The power was one, not so much to sell the foreign stocks, as to leave them outstanding. The power to sell was incidental to the office of executor, and would have existed if no clause to that effect had been contained in the will.

Judgment.

The VICE-CHANCELLOR inquired, whether any arrangement could be made by the parties interested in the estate for suspending the appropriation of the stock for the present, leaving the widow her lien on the entire trust fund? It appearing that this course could not be taken, His Honor held that,—however the case might have been if the trustees had acted upon their own responsibility,—the Court would only execute the trusts of the will by directing the sale, and investment in Consols, of a sufficient part of the trust property to provide for the annuity to the widow.

Decree.

DECLARE, that, according to the true construction of the will of the testator, *Guy Lenox Prendergast*, the Plaintiff, is entitled to have so much of the personal estate of the testator invested in Bank 3½ per Cent. Consolidated Annuities as shall be sufficient to produce a clear income of 1500*l.* per annum. Refer it to the

(a) 1 Myl. & Cr. 80.

Master to inquire and state to the Court, what parts of the personal estate and effects of the testator ought, having regard to the interests of all parties, to be sold for the purpose of purchasing Bank 3½. per Cent. Consolidated Annuities sufficient to answer such annuity as aforesaid; and whether it will be for the benefit of the infant Defendants that the residue of the personal estate and effects of the testator, or any and what part thereof, shall be sold or left on the present securities, or what shall be done therewith. Liberty to state any circumstances specially with relation thereto. And the Master is to state specially the grounds on which he shall have come to any conclusion in relation thereto.

1846.

PRENDERGAST
v.
LUSHINGTON.

Decree.

SOME of the Defendants to the cause, against whom process was prayed when they should come within the jurisdiction, were desirous of appealing from the decree, and applied by petition for leave to appear and put in their answers; whereupon the Court, *by consent*, ordered that the said Defendants should be at liberty to appear and put in their answer to the Plaintiff's bill filed in this cause, and that the said cause should be again set down pro formâ before His Honor the Vice-Chancellor Sir *James Wigram*, to be heard on further directions, for the purpose of making the decree, dated the 26th day of January, 1846, binding against the said petitioners, the Defendants, &c.

Cause set down again for hearing on further directions, on the petition of Defendants out of the jurisdiction at the first hearing, who subsequently appeared,—in order to enable them to appeal from the decree.

AFFIRMED by the Lord Chancellor on appeal, Nov. 19, 1846. The cause was afterwards re-argued, one of the executors and trustees, who proved the will since the decree, being willing and desirous to take upon himself, and act in, the execution of the trusts. The Lord Chancellor, on the 21st of January, 1847, affirmed the decree, with costs; first, upon the construction of the will, having regard to the rule of the Court; and, secondly, on the ground that the question was determined by the decree at the original hearing, from which there had been no appeal. See *Mr. Phillips' Reports*.

Appeal to the Lord Chancellor.

1846.

Jan. 22nd.

Order, on the application of the Plaintiff, to dismiss his bill, with costs, against disclaiming Defendants, without prejudice to any question how the costs should ultimately be borne.

BAILY v. LAMBERT.

CERTAIN of the Defendants in this case having, by their answers, disclaimed all interest in the subject of the suit,

Mr. *Le Neve Foster*, for the Plaintiff, moved that the bill might be dismissed against them, with costs to be paid by the Plaintiff, but without prejudice to any question which should be thereafter raised by the Plaintiff as to the mode in which such costs should be ultimately borne. The other Defendants were not served with notice of the motion.

The VICE-CHANCELLOR made the order.

A question was afterwards made in the Registrar's Office on the form of qualification introduced in this order,—it being suggested that it might prejudice other parties to the cause, who were not served with the notice of motion, and were not parties to the order. The case was again mentioned to the Vice-Chancellor; but His Honor adhered to the order, observing, that it could not possibly prejudice the case of any party; that it only postponed the argument, and was calculated to diminish the expense.

1846.

WARD v. BASSETT.

28th January.

THE bill was filed to establish the claim of creditors against the real estate of a testator, in the possession of his devisees in trust. The devisees were empowered to sell the estate, and give discharges for the purchase-money and the rents and profits.

In a suit since the 30th Order of August, 1841, to establish the claims of creditors of a testator against his real estate devised, legatees, whose legacies are charged on such real estate, are not necessary parties, where there are devisees in trust, having the powers specified in the Order.

Mr. *Anstey*, for two pecuniary legatees, whose legacies were charged on the real estate, submitted that they were unnecessary parties to the suit, since the 30th Order of August, 1841 (*a*), and that they ought to be paid their costs and dismissed from the suit.

Argument.

Mr. *Teed* and Mr. *Campbell*, for the bill, said, the case was to be distinguished from one in which the object was to carry into effect the trusts of a will; here the Plaintiff came to enforce his legal rights against the will, and against the parties claiming under it. The trustee might well represent the entire estate, where the suit was for the benefit of the estate; but in an adverse suit each person interested might be entitled to make his own defence. They referred to *Miller v. Huddleston* (*b*).

Judgment.

The VICE-CHANCELLOR said, it appeared to him that the legatees were not necessary parties to the suit. He could not however direct the Plaintiff to pay their costs, after the reported case of *Miller v. Huddleston*. He did not mean to give any opinion upon that case. Probably, the better course for the legatees in this case might be, that they should remain parties, and endeavour to obtain their costs on the winding up of the estate.

(a) Beavan, Ord. Can. 173.

(b) 13 Sim. 467.

1846.

8th & 23rd
May.

EARLE v. HOLT.

The acceptor of a bill of exchange, who had by the hands of the drawer as his agent paid the amount of the bill after it became due to an indorsee for value, without procuring it to be delivered up, filed his bill against such indorsee for value and a subsequent indorsee, charging that the indorsee, to whom the payment had been made, had afterwards indorsed the bill to the other Defendant, without consideration, in order to recover the money from the Plaintiff a second time, and praying that an action commenced against him for the amount might be restrained, and the bill delivered up to be cancelled. Demurrer,—for want of the drawer as a party to the suit,—overruled.

IN August, 1843, the Plaintiff, *Earle*, was indebted to *Bott* in the sum of 50*l.*; and in payment of that debt *Bott* drew a bill of exchange for that sum, dated the 11th of August, payable two months after date, which was accepted by *Earle*. *Bott*, the holder and drawer of the bill, indorsed it for value to *Goodyear*. The bill became due on the 14th of October, 1843, and was then presented to *Earle* for payment; *Bott*, at the request of *Earle*, applied to and obtained from *Goodyear*, a few days further time for payment. On the 30th of October, 1843, *Earle* paid 25*l.* to *Bott*, on account of the bill, which *Bott* forwarded to *Goodyear*; and on the 15th of November, *Earle* paid to *Bott* the remaining sum of 25*l.*, which the latter also paid over to *Goodyear*. *Goodyear*, instead of delivering up the bill of exchange, retained it in his possession. An action was afterwards commenced upon the same bill of exchange, by the Defendant *Holt* against *Earle*, who alleged that he was indorsee for value; *Earle* pleaded to the action, payment to *Goodyear* of the 50*l.* in discharge of the bill after it became due, whilst *Goodyear* was the holder, and that *Goodyear* had indorsed it to *Holt* after it became due, and after he had so received payment in January, 1845. By his replication to the plea, *Holt* denied the alleged payment to *Goodyear*, and denied that *Goodyear* had received the 50*l.* in discharge of the bill of exchange; *Earle* then filed his bill against *Holt* and *Goodyear*, stating the foregoing case, and charging that the bill had been indorsed by *Goodyear* to *Holt*, without consideration; and that *Holt* and *Goodyear* had agreed to divide between them the money which should be recovered in the action. The bill prayed, that the

Defendants might answer and discover the matters charged; that *Holt* might be restrained from proceeding in the action; and that the bill of exchange might be delivered up to be cancelled.

1846.
EARLE
v.
HOLT.
Statement.

The Defendants *Holt* and *Goodyear* demurred, for that *Bott* ought to have been, and was not, a party to the suit.

Mr. *Kenyon Parker* and Mr. *Hetherington*, for the Defendants.—*Bott* is the drawer and the first indorser of the bill of exchange, of which it is the object of this suit to procure the cancellation. If the facts stated by the bill were admitted by the Defendants in their answers, *Bott* would not be bound by such admission; and the implied admissions of fact, for the technical purpose of trying a question of law upon demurrer, cannot be treated as of higher effect than an actual admission for all purposes. The demurrer, which admits the facts stated in the bill, admits them against the demurring party only,—not as against the other parties to the suit,—and certainly not against persons not parties to the suit: *Penfold v. Nunn* (a). They cited also *Macartney v. Graham* (b).

Argument.

Mr. *Romilly* and Mr. *Wright*, for the bill.

VICE-CHANCELLOR:—

Judgment.

The demurrer to this bill is for want of parties only; and, provided the record is properly framed in that respect, there is no objection for want of equity. The sole question is, whether a person of the name of

(a) 5 Sim. 405.

(b) 2 Sim. 285.

1846.

EARLE

v.

HOLT.

Judgment.

Thomas Bott is a necessary party to the bill. *Bott*, who was the drawer and holder of a bill of exchange which had been accepted by the Plaintiff, indorsed the bill for value to one *Goodyear*. The effect of this would be, that *Bott* thereby parted with his interest in the bill. When the bill became due, the Plaintiff, through the aid of *Bott*, obtained a short time for payment, and soon afterwards paid the sum of 25*l.*, and after a short interval the further sum of 25*l.* to *Bott*, who paid the two sums over to *Goodyear*, whereby, as between the acceptor and the holder of the bill, the bill was discharged. The statement of the Plaintiff is, that *Bott*, having indorsed the bill to *Goodyear* for value, thereby ceased to have any interest in the bill; and that he did not, from the time of the indorsement down to the time of filing the bill in this cause, claim any interest in it. The two payments of 25*l.* by the Plaintiff to *Bott* are alleged to have been made to him, as the agent of the Plaintiff, for the purpose of paying them over to *Goodyear*. That relieves the case of any difficulty which might arise from the circumstance of the payment being made to *Bott* in the first instance, and not to *Goodyear*. It is then stated, that *Goodyear*, instead of handing over the bill, after his interest in it had been satisfied, to the Plaintiff, or to *Bott*, as his agent, indorsed it over to the Defendant *Holt*, when the bill, upon the face of it, was overdue, and had in fact been paid,—and that this indorsement was without consideration, and for the fraudulent purpose of recovering the money from the Plaintiff a second time. The bill charges, to the effect, that a scheme had been entered into by the Defendants to defraud the Plaintiff; in pursuance of which, an action had been brought by *Holt* against the Plaintiff; and it prays a discovery and injunction, and the delivery up of the bill of exchange to be cancelled. The Defendants by demurrer insist that *Bott* has not ceased to

be interested in the bill, and that he is therefore a necessary party to the suit. If the statement in the bill is true, it cannot be disputed, and was not denied, that the Plaintiff is entitled to have the bill delivered up. The sole question is, whether that equity can be administered without *Bott* being a party to the record. I am of opinion that it is not necessary he should be a party. He had, at the beginning, an interest in the bill of exchange, which would make him *prima facie* a necessary party to the suit; but the bill states matters, which, if true, shew that the note has been so dealt with, that *Bott* has ceased to have any interest in it. It has not indeed been argued that *Bott* is a necessary party to the bill, by reason of his interest in the note; but the argument is this, (and it is one which I have heard for the first time), that, although the demurrer of *Holt*, the indorsee since the bill was paid, and *Goodyear* the original indorsee for value, admits the facts stated in the bill to be true, yet, inasmuch as that admission would not be evidence at the hearing as against *Bott*, he is therefore a necessary party. Now, the reasoning upon demurrers, ever since I have known the meaning of demurrer, is that which is stated by Lord *Eldon* in *Kemp v. Pryor* (a): "If the facts stated on the bill, on being proved or confessed, would entitle the Plaintiff to relief, the demurrer must be overruled." The argument was, that this admission could not be used against *Bott* if he were a party to the record. That is not the rule by which demurrers are tried. For the purposes of the demurrer, the admission has the same effect as if the facts stated in the bill were proved at the hearing. It is quite another question, whether, at the hearing of the cause, the admission of one Defendant by answer can be read

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 Judgment.

(a) 7 Ves. 237.

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 —
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against another Defendant. The demurrer admits the facts stated upon the bill to be true; and taking them to be true, the Plaintiff is entitled to relief in this Court without the presence of *Bott* upon the record. Cases upon this subject are of common occurrence, and I am surprised to hear any doubt expressed upon the point.

The case of *Penfold v. Nunn* (a) was cited, in which the *Vice-Chancellor of England* is reported to have held, that the party demurring admits the facts to be true only as against himself, and that, if further proof is necessary against another person, that person ought to be a party to the bill. Whether the *Vice-Chancellor* expressed himself in terms so general I have no means of knowing. A very slight variation of language would make a great difference. I do not mean to give any opinion, whether a case may not be stated abstractedly, in which there may be no possibility of proving a given state of things, unless a given person be a party on the record. It is clear, however, that the general rule of the Court is that which I have stated. The demurrer must be overruled. I do not give the costs. The case of *Penfold v. Nunn*, and some of the circumstances of this case, afford a justification for the demurrer.

(a) 5 Sim. 405.

1846.

28th & 29th
May, 17th,
18th, & 19th
November, &
2nd December.

PRESTON v. WILSON.

THIS was a bill filed in the month of November, 1843, for redemption, and for an account of the rents and profits of the mortgaged property received by the Defendant *Wilson*, as a mortgagee in possession. The bill was met by the allegation, that an agreement had been made and signed by the Plaintiff and Defendant, whereby the Plaintiff had agreed to sell, and the Defendant had agreed to purchase, the equity of redemption of the mortgaged premises; and that the Defendant had paid to the Plaintiff the sum agreed upon as the consideration for such sale and purchase. The Defendant *Wilson* also by his answer alleged, that, on the 18th of May, 1843, the Plaintiff filed his petition in the Court of Bankruptcy, to avail himself of the provisions conceded to debtors not owing more than £300, by the act of Parliament in that behalf made and provided (a); and that an order was made by the Court of Bankruptcy in the matter of the said petition for the protection of the person of the Plaintiff from all process; and that the estate and effects of the Plaintiff were duly vested in *W. Turquand*, the official assignee named by the commissioners for that purpose; and the same, as the Defendant believed, were then still vested in the said *W. Turquand*. And the Defendant sub-

The Plaintiff filed his petition in the Court of Bankruptcy under the provisions of the Act 5 & 6 Vict. c. 116, for the relief of insolvent debtors not owing more than £300, and passed his examination, and obtained his interim and final orders for protection. He then filed an affidavit in the Court of Bankruptcy, stating that he had satisfied, and obtained a discharge from, all the creditors named in his schedule; and that he had notified such satisfaction and discharge by public advertisement. The Plaintiff then applied to the official assignee for a release of his estate, which, according to the pro-

visions of the act, vested in such assignee on the presentation of the petition; but in the absence of any proviso in the act for determining the duties of the official assignee in such a case, the Plaintiff was unable to obtain any release or reconveyance. The Plaintiff then filed his bill against the Defendant, as mortgagee, for the redemption of an estate, which had been mortgaged before he presented his petition to the Court of Bankruptcy. Upon the objection of the Defendant, that the estate of the Plaintiff (if any) was vested in the official assignee:—*Held*, that, in the absence of any statutory jurisdiction on the subject in the Court of Bankruptcy, and upon the submission of the assignee, the Plaintiff was entitled to sustain the suit at the hearing.

Whether, if the Defendant had demurred, the bill would have been sustained—*quære*.

(a) An Act for the Relief of Insolvent Debtors, 5 & 6 Vict. c. 116.

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—
Statement.

mitted, and insisted, that, under the circumstances aforesaid, the Plaintiff had no estate or interest whatsoever in the premises comprised in the indentures of mortgage, or any of them; and that the equity of redemption, which the Plaintiff originally had therein, was duly made over to and vested in him (*Wilson*) by the Plaintiff as thereinbefore mentioned; and that if the same had not been so made over to and vested in the Defendant, the same would have been vested in the said official assignee of the Court of Bankruptcy; and that, in any event, the Plaintiff had no right, title, or interest whatever, in or to the said premises, or any of them, and that the bill ought to be dismissed with costs. The Defendant *Wilson* further submitted, that, if the Plaintiff should further prosecute his suit, the official assignee of the Court of Bankruptcy was a necessary party as a Defendant thereto.

The Plaintiff then amended his bill, charging, to the effect, that he had been induced to sign the alleged agreement, on the representation that it was merely an authority to the tenants of the property to pay their rents to the Defendant *Wilson*, and in entire ignorance that it purported to be an agreement for the sale of the estate. He also, by amendment, stated, that he had paid all his creditors 20s. in the pound, and obtained a release from them; and that *W. Turquand*, the official assignee, had refused to execute any disclaimer or assignment to the Plaintiff of the equity of redemption, on the ground that he (the official assignee) had no estate or interest therein. The official assignee was also made a Defendant to the amended bill.

The Defendant, *W. Turquand*, by his answer, said, that, on or about the 18th of May, 1843, the Plaintiff presented his petition to the Court of Bankruptcy, pray-

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ing the relief afforded under and by virtue of the stat. 5 & 6 Vict. c. 116, intituled, "An Act for the Relief of Insolvent Debtors," and under which said insolvency the Defendant was duly appointed official assignee; that, in the Plaintiff's schedule to his said petition annexed, no mention whatever was made of the equity of redemption mentioned in the bill; but that, in an extra balance sheet to the Plaintiff's said schedule filed therewith or subsequent thereto, mention was made of the said equity of redemption as follows:—"1841. January to August, by cash which I borrowed of Mr. *David Wilson*, of &c., during this period, on a mortgage of the lease of the *Dowse* estate, *Twig Folly, Bethnal Green*, in the county of *Middlesex*, on which he foreclosed, 650*l*." The Defendant, *Turquand*, by his answer, further stated, that, on or about the 23rd of November, 1844, the Plaintiff filed, or caused to be filed, in the Court of Bankruptcy, in the matter of his said petition, an affidavit of one *C. J. Faulkner*, and which was in the words following: "In the Court of Bankruptcy. In the matter of *Adam Preston*, of &c., late an insolvent debtor, *C. J. Faulkner*, of &c., maketh oath and saith, that the said *Adam Preston* did, in the month of May last, file a petition to this honorable Court, as also a schedule containing his debts and credits, and otherwise comply with the provisions of a certain act of Parliament, passed &c., (5 & 6 Vict. c. 116); that the said *Adam Preston* did, on the 26th of June last, pass his first examination, and obtain his interim order for protection; that, on the 11th of July last, the said *Adam Preston* did obtain his final order for protection; that, since the protection so given to the said *Adam Preston* by the Court, the said *Adam Preston* hath well and truly satisfied the whole of the said persons to whom he was indebted, whose names and respective amounts are set out in the said schedule so filed in this honorable Court, and obtained from each

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—
Statement.

and every of them a discharge thereof, dated in or about the month of October last; and that the said *Adam Preston* did, on the said 11th of October last, duly advertise in the *Morning Advertiser*, a notification of his so having satisfied all his said debts; and that no provision being made in the above-mentioned act of Parliament, for the purpose of taking off the file of this honorable Court, the said petition, schedule, or other papers of the said *Adam Preston* filed therewith, this affidavit is requisite to be filed with the said papers in lieu thereof." The Defendant *Turquand*, by his answer, further stated, that, after filing the said affidavit, and on the 20th of March, 1844, he (*Turquand*) was applied to by the solicitor for the Plaintiff to execute to the Plaintiff a final release of all his (the Plaintiff's) estate and effects; and that, in reply to such application, his solicitor, by a letter, dated the 26th of March, stated to the solicitor of the Plaintiff, to the effect, that he felt much difficulty in the case, not arising from any desire to impede the proposed arrangements on behalf of the Plaintiff, but to protect the Defendant, *IV. Turquand*, who he considered ought not to be the party to ascertain whether all the creditors had been satisfied or not; that, in case of bankruptcy, the superseding the fiat put an end to the duties of the official assignee, and no assignment from him was necessary: in cases of insolvency under the old act, the schedule was taken off the file, and the warrant of attorney directed to be given up to the party by order of the Court; but in cases of insolvency under the new act, no such arrangement was ever contemplated; and the previous practice did not assist him in advising upon the course to be pursued by the Defendant *Turquand*. The defendant, *Turquand*, then, by his answer, submitted, that, if the said schedule and extra balance sheet annexed to the Plaintiff's said petition comprised a

full and true schedule of the Plaintiff's property, as in pursuance of the provisions of the said act it ought to do, the Defendant (*Turquand*) had not then, and never had, any right, title, or interest whatever, of, in, or to the said equity of redemption, or any part thereof; and he disclaimed all such right, title, and interest, and every part thereof,—nevertheless he was ready and willing to act in the premises as this Court should direct, on being indemnified and paid his costs.

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—
Statement.

The Plaintiff proved the release executed to him by the scheduled creditors. On the question of the alleged fraud, the evidence was very conflicting.

At the hearing of the cause,

Argument.

Mr. Romilly and Mr. W. Rudall, for the bill.— The Plaintiff having, as it appears by the answer of the official assignee, and by the evidence in this cause, paid the debts of all the creditors whose names are in his schedule, the purposes for which his estate vested in the assignee are fully satisfied. The assignee has no longer any trust or duty in the matter. The act prescribes no mode by which the estate of the petitioner under the act shall be reconveyed to or revested in the bankrupt; from which it must be inferred, that the effect of the proceeding under the statute is only to vest the estate in the assignee, so far as is necessary for the satisfaction of the creditors, against whom the petition and final order is to be a protection. (Sect. 10). They cited also *Lautour v. Holcombe* (a) and *Saxton v. Davis* (b).

Mr. Anderdon and Mr. Kirkman, for the official assignee, made no claim at the bar, of any interest in

(a) 8 Sim. 76.

(b) 18 Ves. 72.

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—
Argument.

the estate; and stated that the official assignee would submit to the decree of the Court in the cause.

Mr. Rolt and Mr. Walley, for the Defendant.—
The Plaintiff has no title to sustain the suit. Independently of the contract of sale, which the Defendant insists upon, and supposing that contract had not been made, all the interest of the Plaintiff in the property is vested in the official assignee. It is impossible to deny that this is the result of the statute under which the Plaintiff applied for protection. The enactment is, that, upon the presentation of any such petition, all the estate and effects of the petitioner shall forthwith become vested in the official assignee, who shall be nominated by the commissioners acting in the matter of the petition;—and the official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under the bankrupt laws (*a*). It is not necessary to argue, that, after the estate of a bankrupt is vested in his assignee, he cannot himself bring a suit to recover it. *Major v. Auckland* (*b*) is an example of the same disability in an insolvent debtor. The evidence of the satisfaction of the creditors of the Plaintiff is obviously insufficient. A release from certain persons is no proof that all the creditors are paid. Even if the persons whose release is evidence were shewn to be all the persons named in the schedule, there may still be others unsatisfied; and for those other persons the official assignee is a trustee, as well as for the persons named. The official assignee does not in fact disclaim: he submits to act as the Court shall direct; but that is not a disclaimer. The only direction which the Court would make is, that the assignee shall fulfil the duty of his trust; and that he can

(*a*) Stat. 5 & 6 Vict. c. 116, s. 2.

(*b*) 3 Hare, 80.

only do, by taking upon himself the estate, until he has been divested of it in due course of law, whatever the proper form may be. They cited also *Borell v. Dann* (a).

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—
Argument.

Mr. Romilly, in reply.—If the Plaintiff be not permitted to institute a suit, he may be deprived of his property without remedy, for he has no means of compelling the assignee to interfere, either actively, or by allowing his name to be used. The official assignee would, at the utmost, be a trustee only for the scheduled creditors; and if those are satisfied, the trust must cease. There is no ground for supposing that there are any other creditors. He also referred to the 11th of the General Orders made by the commissioners, by which it is provided that the proceedings (except as is otherwise ordered) shall be in conformity with the proceedings in bankruptcy (b).

The case stood for judgment on the question involved in the above argument. The *Vice-Chancellor*, after some consideration, directed that the hearing of the whole case should proceed, in order that, if his judgment should be unsatisfactory to either party, the *Lord Chancellor* might, upon appeal, have the whole case before him. The whole case was accordingly heard.

Nov. 17th,
18th, & 19th.

VICE-CHANCELLOR, after stating the pleadings:—

Judgment.

In the case of *Tarleton v. Hornby* (c), when at the

- (a) 2 Hare, 440. better carrying into execution
(b) Rules and Orders, &c., 1 the stat. 5 & 6 Vict. c. 116, as
November, 1842. See the Rules amended. (2 Deacon's Bank-
and Orders made under the 7 ruptcy, by De Gex, p. 291).
& 8 Vict. c. 96, s. 38, for the (c) 1 You. & Col. 172. His

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bar, and in *Thompson v. Derham* (a), I had occasion to consider the effect of the bankrupt laws in excluding the jurisdiction of this Court, in cases to which its jurisdiction would otherwise extend; and in both cases I was strongly impressed with the necessity of maintaining, to the fullest extent which may be consistent with justice, the exclusive jurisdiction of the Bankrupt Courts in cases committed to their administration; and I adhere to the opinion which I expressed in *Major v. Aukland* (b). And if it were clear that the powers of the commissioners under the stat 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, were co-extensive with their powers under the bankrupt acts, and that cases under those acts were amenable to the jurisdiction of the Court of Review, in all respects, as in bankruptcy, I should probably have thought it best to tell the Plaintiff in this suit, that he must, by proceeding before the commissioners charged with the execution of the statutes above referred to, reinstate himself in the clear ownership of his property, before he could call upon this Court to treat him as owner of, or as having an interest in, it. But there are difficulties in the way of a decision to that effect in the present case. The jurisdiction of the Commissioners of Bankrupts is a limited jurisdiction. They have not, as this Court has, an original and general jurisdiction, within which cases of a given class will fall of themselves, unless by some special act of the Legislature they are withdrawn from it. The powers of the commissioners being new, and derived from special statutes, are limited by those statutes. The statutes in question give the commissioners

Honor observed, that the judgment of the Lord Chief Baron in *Tarleton v. Hornby* contains an historical account of the manner in which the Court of

Bankruptcy acquired jurisdiction to deal between the bankrupt and his assignees.

(a) 1 Hare, 353.

(b) 3 Hare, 77.

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 —
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powers adequate to the duties with which they are charged, of administering the estate of the insolvent amongst his creditors; and of calling his assignees to account for that purpose; and they have power, in certain specified cases, to dismiss a petition; but I do not find any *express* powers given them to compel the assignee to assign a surplus to the bankrupt, or to dismiss a petition, or take it off the file in a case like the present. The statutes give no appeal from the decision of the commissioners to the Court of Review; and it has been decided, that the relative position of the commissioners and the Court of Review does not necessarily carry with it such right of appeal in every case in which a duty may be cast upon the commissioners: *Ex parte William Newlands* (a). Now, in the present case, it was stated at the bar, that the Plaintiff had endeavoured, but without success, by proceeding before the commissioners, to put himself in that position, with respect to the ownership of this property, in which, in ordinary cases, a Plaintiff should stand. This statement I cannot regard as a matter of fact, because it has not been proved; but the result of the inquiries which I have made upon the subject has been this,—that if the Plaintiff had made that application, which he tells me he has made, the result would have been that which he tells me was the result of his alleged application. What the proper decision in this case would have been, upon demurrer, if the Defendant *Wilson* had demurred, or at the hearing, if Mr. *Turquand* had resisted the jurisdiction of the Court, I will not say. There are many cases, however, in which the Court has held, at the hearing, that an objection, which, in the abstract, might be good upon demurrer, is removed at the hearing by the different question, which, upon the whole case, is then presented to the Court. But,

(a) 1 De Gex, 150.

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in this case, (as it is now before me), having regard to the difficulties which I have stated, to the answer of the official assignee, and to the offer made at the bar by the counsel for the official assignee to submit to such decree as the Court might make, whatever the leaning of my own opinion may have been, (the statutes containing no express provision applicable to the case), I think I ought not to dismiss the bill on the ground only of want of jurisdiction. The form of the decree to be made in this Court, so as to prevent the possibility of that decree working injustice to the creditors (if any) having an interest under the statute, is another question. The Plaintiff will get no decree without submitting to such terms as may be just with regard to the creditors.

Where the issue raised by the bill and answer was, whether the Plaintiff had or had not signed a document under the representation and belief that it was an authority to another to receive the Plaintiff's rents, when it was in fact a contract for the sale of his estate—evidence of the value of the estate cannot be regarded as shewing that, if a purchase, it was a purchase from a distressed man at an undervalue, but can only be regarded as bearing on the probability or improbability of the alleged sale.

His Honor then went into an examination of the evidence on the questions of fact in issue, relating to the alleged agreement for the sale of the property. Much evidence had been gone into on each side, with regard to the value of the property, which, his Honor held, had nothing to do with the case, except so far as the valuation might bear on the probability of the alleged sale of the equity of redemption being true. He could not in any other way put the issue of this case, on the ground of its being a purchase from a distressed man at an undervalue, the case on the bill being that of a fraudulent representation, that a paper signed by the Plaintiff was a merely ministerial act, when in truth it was a contract of sale; and he concluded by directing two issues:—whether, before the 17th of December, 1842, it was agreed that the Plaintiff should sell to the Defendant the equity of redemption of the property in question; and whether, at the time of signing the paper of the 17th of December, 1842, the Plaintiff knew the contents, purport, or effect thereof.

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GRIFFITH v. RICKETTS.

11th & 13th
February.

THIS cause, on demurrer, is reported 3 Hare, 476.

The demurrer was allowed, with liberty to the Plaintiff to amend her bill. The bill was afterwards amended. In the mean time, the Plaintiff, proceeding in the Ecclesiastical Court, by the name of *Albina Molloy*, otherwise *Griffith*, spinster, obtained letters of administration ad litem, of the estate of *Solomon Moore*.

The Defendant, *Caroline Rosina Frost*, moved to take the bill off the file, or, in the alternative, that the Plaintiff might be ordered to give security for the costs of the suit. The ground of the motion was that whilst the Plaintiff sued in this Court, in the name and description of *Albina Griffith*, widow of *E. Griffith*, her real name and description was in fact *Albina Molloy*, spinster, as proved by the proceedings in the Ecclesiastical Court, not only in relation to the recent grant of letters of administration, but also in the cause in which she obtained probate of the will of *E. Griffith*, under which the claim in this suit was made.

The Plaintiff brought her bill for redemption, describing herself as A. B., the widow of the mortgagor, and claiming as his devisee and executrix; but she obtained probate of the will as A. C., otherwise B., spinster:—
Held, that, as the description of the Plaintiff in the suit involved the question of her title under the will, the above variance did not entitle the Plaintiff to have the bill taken off the file, or security given for costs.

Statement.

Mr. Romilly and Mr. Osborne, for the motion.—The Plaintiff is suing in a false name, and by a false description. This entitles the Defendant to have the bill taken off the file. *Fry v. Mantell* (a).

Argument.

Or, on the ordinary practice of the Court, it entitles

(a) 4 Beav. 485.

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the Defendant to require security for costs: 1 Dan. Chan. Pract. 463. The injury which the Defendant may suffer from permitting a suit to be prosecuted under a fictitious name is obvious. She cannot effectually execute any process against the Plaintiff for costs, if the bill be dismissed. The Sheriff would not take, (*Wilks v. Lorck (a)*), or if he had taken would not detain, (*Morgans v. Bridges (b)*), a party not answering the description of the person against whom the process issued.

Mr. *Tinney* and Mr. *Pirie*, for the bill.—The Plaintiff sued, not by a false name, but by the name and in the character in which she claimed the property in question. The circumstance that in another Court she had not established her right to that name and description, and had submitted to adopt another for a special purpose, was not conclusive against her title to the description, which she assumed in this suit. In fact, there was nothing upon which the Court could conclude that the description in the bill was not the correct one, only because of the different description assumed in the Ecclesiastical Court. It was not intended, and evidently was not calculated, to mislead. Nor had the Defendant been misled, for an attachment for costs had been executed against the Plaintiff in this suit, without any such difficulty as that suggested. *Simpson v. Burton (c)*.

13th Feb.
 —
Judgment.

VICE-CHANCELLOR:—

I do not think it right in this case to make any order, either for staying the suit, or as to the costs. I agree with the argument that, if the Plaintiffs in a suit do not

(a) 2 Taunt. 399. (b) 1 B. & A. 647. (c) 1 Beav. 556.

properly describe themselves, the Court is bound to see that the erroneous description is corrected. A party has no right to embarrass his adversary by such misdescription. But I cannot consider this case as obnoxious to that observation. The testator in this case gave to his widow *Albina*, the daughter of *Sarah Molloy*, all the residue of his real and personal estate, and appointed her his executrix. The devisee and executrix has filed her bill to redeem certain mortgaged property, and in that suit she describes herself as the widow of the testator. As claiming the benefit of the devise, she must prove that she answers the description in the will, and that involves the question of title. The question therefore is, whether upon a motion to take the bill off the file, or make her give security on the ground of misdescription, I am in this stage of the cause to enter into a question which involves in some sense the merits of the case. The circumstance that the probate has been obtained in a different name is certainly not conclusive on the question. It is matter of evidence, but I cannot treat it as conclusive evidence. As to the other point,—whether the description given of the Plaintiff might embarrass the Defendant in any process which he might have to take out against her for costs, no case approaches this in form, except *Morgans v. Bridges* (a). But that case really has no bearing upon the present. There the sheriff was ordered to attach an individual by name. He attached a person whose christian name did not correspond with that of the person whom he was ordered to attach; but the person whom he did attach had a brother whose name was that of the person whom he was ordered to attach. Then, upon an action against the sheriff for an escape, it was held that the sheriff was justified in letting the party go; and, although the

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(a) 1 B. & A. 647.

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—
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party who was attached had before described himself, out of Court, as having the name of his brother, the Court thought that no reason why the sheriff should enter into the question,—he being told to attach a given individual. It is clear that in that case no difficulty could occur. It does not appear to me that in this description there is such an absence of certainty as to furnish solid ground for believing it could enable the Plaintiff to escape from process.

I cannot make any order that the Plaintiff shall give security for costs. She is suing as devisee and executrix in this Court to recover what may be coming to her in that character from the mortgagee in possession. The Plaintiff produces her probate as her title, and the fact that she is there described as spinster, and not as wife, does not, when compared with the character in which she sues, involve such a misdescription as to entitle the Defendant to call for security.

Motion refused, without costs.

1846.

FOOKS v. WILTS, SOMERSET, AND WEY-
MOUTH RAILWAY COMPANY.

25th Feb.

THIS was a motion to restrain the Defendants, their servants, workmen, and agents, from entering upon, taking possession of, using, digging, or excavating the plot of land in the pleadings mentioned (except for the purpose of surveying or taking levels of the said land, or of probing or boring to ascertain the nature of the soil, or set out the line of the works, after giving to the Plaintiff not less than three days' notice thereof) until they shall have given notice to the Plaintiff of their intention to take such land, and shall have offered to treat for the same, and until the price, or purchase-money, or compensation for the same shall have been agreed upon, or otherwise settled or assessed, and until such purchase-money shall have been paid or deposited.

A railway company, having power to purchase a plot of land for their railway, entered upon the same to survey and take levels thereof, and probe or bore to ascertain the nature of the soil, and set out the centre line of the railway, and for that purpose they dug a trig line or trench two inches deep and fourteen inches wide across the plot of land, but they gave the owner of the land no previous notice of such entry as required by the 84th section of the Lands' Clauses Consolidation Act (8 Vict. c. 18). Five days after the trig line was made, the owner of the land discovered the fact, and nine days from such discovery he filed his bill for an injunction. Upon the affidavits on the

It appeared that the *Wills, Somerset, and Weymouth* Railway Company were incorporated by an act passed in 1845, and were empowered to take the plot of land situated at *Weymouth*, for the purposes of their railway. The bill and affidavits stated, that the Plaintiff, the owner of the land, had been absent from *Weymouth* for twelve months preceding the 3rd of February, 1846, and that having occasion to be in that neighbourhood on the said 3rd of February, he then, for the first time, discovered that the company had, by their workmen or agents, entered upon the plot of land and removed the surface of the same, in a line extending for upwards of 100 yards, and nearly through the whole length thereof

part of the company, that the surveying and setting out of the line of railway was completed on the day the trig line was made, and that they had no occasion to enter and did not intend again to enter upon the land until they had taken the legal steps for permanently using it, the Court refused the injunction; but reserved the costs.

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from north to south, and had dug or excavated a ditch or trench on the land, for the length of upwards of 100 yards from north to south; and that the Plaintiff had received no such notice as the Company, by the 84th section of the Lands' Clauses Consolidation Act, were bound to give.

The engineer of the Company, and several of the workmen, deposed, that they entered on the land on the 29th of January, merely for the purpose of surveying and taking levels of the same, and of probing and boring to ascertain the nature of the soil thereof, and of setting out the line of the works; and that they remained on the land for the space of four or five hours and dug a trig-line, two inches deep and fourteen inches wide, for the purpose of marking the centre of the line of railway; and that the earth was only displaced and thrown alongside the trig-line, and was not removed from the land. The engineer also deposed, that, except for the purposes aforesaid, the Company had not entered upon the land; that such work was completed on the 29th of January, and that they had no intention of again entering upon the land to permanently use the same, until they had paid or deposited the price, in the manner provided by the Lands' Clauses Consolidation Act.

Argument.

Mr. *Romilly* and Mr. *Hare*, for the Plaintiff, in support of the application, relied upon the facts which were not in dispute; that the Company had procured from the Legislature the power of entering upon, and of making the compulsory purchase of, the land in question, which power was to be exercised in a prescribed manner (a), and that the Company had chosen to enter upon

(a) Stat. 8 & 9 Vict. c. 18, s. 84 (Lands' Clauses Consolidation).

the land, and disturb the surface of the soil, without regard to the qualifications with which their power was accompanied, and without even alleging the excuse of accident, mistake, or exigency. They referred to *The River Dun Navigation Company v. The North Midland Railway Company (a)*, *Blakemore v. The Glamorganshire Canal Company (b)*.

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—
Argument.

Mr. *Wood* and Mr. *Osborne*, for the Company.—The act complained of is too trifling in its nature and extent to require the interposition of the Court. It moreover appears that there is no intention on the part of the Company to enter again upon the land, without pursuing strictly their legislative powers. The work which has been done upon the land was merely for the purpose of surveying and marking out the line of the railway; that has been entirely completed. The Plaintiff does not allege that he has any reason to believe the Company are about to enter again upon the land; there is not, therefore, any ground for an injunction to restrain the Company from acts which are not threatened or anticipated. The Plaintiff ought to have applied to the Company for some explanation, and if that had been refused, he might possibly have been justified in filing his bill.

Mr. *Romilly*, in reply.—The Plaintiff can only judge of the intentions of the Company for the future by their past conduct. They have thought proper to enter upon the land without notice: if the Plaintiff, when he became aware of the fact, had not applied to the Court, he would have afterwards been met with a charge of acquiescence. The Company cannot be heard to say that

(a) 1 *Railway Cases*, 135, (b) 1 *Myl. & K.* 162.
per Lord *Cottenham*, p. 154.

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the injury is too trifling to call for any remedy, when they have accepted powers on the condition of exercising them in a certain manner. The Legislature has required certain notices to be given, and the Company, in obtaining their compulsory powers, have contracted to give such notices; the Company cannot now say, that what the Legislature imposed, and the Company contracted to do, is too trifling to be observed.

Judgment. VICE-CHANCELLOR:—

It is to be regretted, that the Company were not careful to pursue the forms pointed out by the act. If they had given due notice of their intentions they might have effected their object, and no question would have arisen.

It appears that the act which is complained of was completed on the 29th of January, and nothing was done after that day. On the 3rd of February the Plaintiff went down to *Weymouth*, and saw what had been done. The trespass had been then committed. The bill in this case was not filed until the 12th of February; this was nine days after the Plaintiff says that he discovered the trespass, and fourteen days after all the steps necessary to be taken for the purpose of surveying and marking out the line were completed. By the affidavits which have been made, it appears that nothing has been done by the Company since, and that they have no occasion to enter, and do not intend to enter, again, upon the land until it becomes necessary to take it for the purpose of constructing the railway. It appears, therefore, that the mischief, if any, has been done, and is at an end. I do not see in such a case what would be the use of the injunction, or why it should be granted. I shall

make no order on this motion, but reserve the costs. If the Company should proceed, without acting according to the powers given them by the statute, what has already been done will be material.

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BAMFORD v. BAMFORD.

1845.

19th & 21st
July.

THIS was a bill for dower. The Plaintiff was the widow of *Thomas Bamford*, who, under the will of his grandfather, became at the death of his father in July 1832, seised to him and his heirs of a freehold estate, at *Butterworth* in *Lancashire*, subject to a devise over to the other grandchildren of the testator in case of the death of *Thomas Bamford* without issue. *Thomas Bamford* was, in 1825, sentenced to fourteen years' transportation; and it was proved in the cause, by the returns of convicts at the Home Office, and by some evidence from New South Wales, that he died in that settlement in 1833. He had no issue.

Bill for dower. The defendants in possession denied the title of the widow, alleging that her husband had not been seised of an estate of inheritance in the premises; that allegation being founded on information as to the time of his death, which was believed to be correct, but afterwards found to be erroneous.

Decree for dower and arrears for six years before the filing of the bill, but without costs.

Semble, If the defence to a bill for dower be groundless, or founded on facts which the defendant knew, or with reasonable diligence might have known, to be untrue, the decree would be with costs.

The bill was not filed until February 1843. The Defendants were the other grandchildren of the testator, who had been in possession of the property from the death of the father. The Defendants by their plea (which was afterwards by consent taken as an answer) averred, that *Thomas Bamford* had not at any time during the coverture been seised of an estate of inheritance in the premises, for that he had died in the lifetime of his father, who was the devisee of the preceding estate. This defence appeared to have been founded on an erroneous or irregular return of convicts which had been made to the Home Office, whence the Defendants derived their information; and it was proved

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that the respective deaths of *Thomas Bamford* and his father took place at the times which are above stated. The principal questions which remained were—when the arrears ought to commence, and whether the Plaintiff was entitled to her costs in the suit.

Argument.

Mr. *Romilly* and Mr. *Rogers*, for the bill, submitted that the Plaintiff was entitled to the decree for assignment of dower, with the costs of the suit. In a simple bill for the assignment of dower, where the dower had not been withheld, and the title of the Plaintiff was admitted, the Court gave no costs. *Lucas v. Calcraft* (a). But this rule did not apply to a case in which, as in this case, the dower had been many years withheld, and the title of the plaintiff was denied. The case then came within the ordinary rule of adverse suits, in which the costs must follow the event: *Worgan v. Ryder* (b); 1 Roper. Husb. & Wife, by Jacob, 156. Costs in such cases were given at law, under the Statute of Merton, 20 Hen. 3, c. 1, and Statute of Gloucester, 6 Ed. 1, c. 1; 2 Wms. Saunders, 44 c., note (l); *Meggot v. Meggot* (c); *Outhwaite v. Outhwaite* (d). The old law, as to arrears in dower, gave the widow such arrears from the time her title accrued. *Oliver v. Richardson* (e). By the statute 3 & 4 Will. 4, c. 27, s. 41, no more than six years' arrears are recoverable; but for that period the Plaintiff was clearly entitled. *Curtis v. Curtis* (f) was also cited.

Mr. *Koe* and Mr. *Chandless*, for the Defendants, argued, that this case was not distinguished from those within

(a) 1 Bro. C. C. 134.

(b) 1 V. & B. 20.

(c) Seton Decrees, 261.

(d) Beames on Costs, 22, n. (f).

(e) 9 Ves. 222.

(f) 2 Bro. C. C., 620.

the general rule, as to costs in bills for dower. The Defendants had acted upon the belief that the Plaintiff's husband had died in the lifetime of his father, and therefore without having acquired seisin of the estate; this information they had obtained from the office of the Government, and from the returns, which were the best evidence they could procure on the subject. The Plaintiff herself, by the long delay in making her claim, had shewn that she had, at least for several years, been in doubt whether the facts would establish it. He also contended, that the arrears of dower should be decreed only from the time of demand by the Plaintiff; and no demand was alleged to have taken place until a short time before the bill was filed: Lord Redesdale's Tr. on Pleading, 98, 3rd ed.; 122, 4th ed.

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VICE-CHANCELLOR:—

Judgment.

It is true that, on a bill to assign dower, the rule is that no costs shall be given on either side; but if the defendant adds another case, as by disputing the title of the plaintiff, denying the marriage, or the seisin of the husband, as in this case, or sets up any other ground of defence on which he fails, he may be liable to pay the costs of the suit occasioned by that unsuccessful defence. If the defence in this case had been made without any just ground, or had been founded upon a statement which the Defendants knew, or with reasonable diligence could have known, was untrue, I should have thought the Plaintiff entitled to the costs occasioned by such defence. It does not, however, appear that the Defendants had any means of procuring information of the time of the death of *Thomas Bamford*, except from the office of the Secretary of State. The information which they obtained from that office was such as to

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mislead them, and might have misled any one making a similar inquiry. The decree must be made for dower, with the arrears, not exceeding six years before the bill was filed, and without costs.

Decree.

THIS Court doth order, that it be referred to the Master, &c., to inquire and state what freehold estates *Thomas Bamford*, the grandson of *Edmund Bamford*, the testator in &c., became seised of under the will of the said testator, wherein the Plaintiff, *Hannah Bamford*, widow, is entitled to dower. And it is ordered that the Master do assign to the said Plaintiff her dower in such estates. And the said Master is to assign and set out particular lands or tenements for that purpose; and after the said lands or tenements shall be set out and ascertained, it is ordered, that the Defendants do deliver possession to the said Plaintiff, *Hannah Bamford*, of the lands or tenements that shall be so set out and ascertained for the said dower of the said *Hannah Bamford*, and the tenants thereof are to attorn and pay their rents to the said Plaintiff, *Hannah Bamford*; and it is ordered, that the Master do take an account of the rents and profits of the said estates, whereof the said *Thomas Bamford* became so seised, accrued from the 18th day of July, 1837, being six years prior to the time of filing the Plaintiff's bill, to such time as such lands and tenements shall be as aforesaid set out and assigned, which have been received by the Defendants, or any of them, or by any person or persons by their or any of their order, or for their or any of their use. And it is ordered, that the Master do inquire and state whether any and which of the said Defendants has or have been in the occupation of any of the said estates, and if so, he is to fix an annual sum by way of occupation rent accordingly. And it is ordered, that one-third part of the amount of such rents and profits, which the said Master shall find to have been received by the said Defendants respectively, be paid to the said Plaintiff. And for the better taking the said accounts, &c. Usual directions for production of books, &c., and for making to the parties all just allowances: liberty to apply. And this Court doth not think fit to award any costs of this suit to either party up to this time.

*Reference to
 fix an occupa-
 tion rent, in
 account of ar-
 rears of dower.*

1846.

MATTHEWS v. CHICHESTER.

31st July.
2nd & 12th
November.

THE bill was filed on the 18th of June, 1846. One of the Defendants demurred, and filed the demurrer on the 6th of July. On the same day, it appeared by the affidavit of the Defendant's solicitor, that a letter directed to the Plaintiff's solicitor, informing him of the filing of the demurrer, was put into the post, but it did not appear that the same was received by the latter before eight o'clock in the evening of that day (*a*); nor, in fact, before the following day; and, on the following day, (the 7th of July), the Defendant's solicitor served the Plaintiff's solicitor with a formal notice of the filing of the demurrer. By the Order XXIII of the 26th of October, 1842, it is ordered, that when a solicitor, or party, shall cause a demurrer to be filed, he shall, *on the same day*, give notice thereof to the solicitor of the adverse party. If the demurrer were taken to be filed on the day on which it was actually filed, the twelve days allowed by the Order XLVI of May, 1845, for setting down the demurrer for argument, or serving an order for leave to amend the bill, expired on the 18th of July; but, if the twelve days were to be reckoned from the time that the notice of filing the demurrer was given, then they did not expire until the 19th of July, and the 19th of July being a Sunday, any proceeding, which must otherwise have been taken on that day, was, according to the Order XIII of May, 1845, valid, if done on the 20th of July. On the 20th of July, the Plaintiff, by petition of course at the Rolls, obtained an order for leave to amend his bill, on or before the 3rd of August. On the 21st of July, the Plaintiff's solicitor

Where the Defendant omitted to give the Plaintiff notice at the proper time that a demurrer to the bill had been filed, and the Plaintiff irregularly obtained an order as of course to amend his bill, on or before a certain day, which order he obtained after twelve days from the filing of the demurrer, but within twelve days from the time he received the notice, the Vice-Chancellor, on a special motion, (made after the expiration of the former order) restored the bill, and gave the Plaintiff leave to amend; but the Lord Chancellor, on appeal, discharged the order.

Statement.

(*a*) See the Order XXII of 26th of October, 1842.

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Statement.

tor served this order to amend on the Defendant's solicitor, and paid him 20s. costs. On the 22nd, the Defendant's solicitor returned to the Plaintiff's solicitor the order and the 20s. costs, stating that the order had been obtained too late. The Plaintiff, on the 23rd of July, gave notice of motion for leave to amend the bill, or that the demurrer might be taken off the file. The Court refused the motion, on the ground, as to the first alternative of the notice of motion, that there was an existing order to amend, which was made at the Rolls, and was still in force; and, as to the second alternative, that the Plaintiff, by taking an office copy of the demurrer, had waived the irregularity of the service of notice, if that irregularity would otherwise have been a ground for taking the demurrer off the file, as to which point the Court expressed no opinion. The time for amending under the Rolls Order expired on the 3rd of August; and on the 4th of August, the Plaintiff gave notice of motion, that he might be at liberty to amend the bill, as he might be advised, notwithstanding the time allowed by the 46th Order had expired.

*Nov. 2nd,
Argument.*

Mr. Romilly and Mr. Grove, for the motion; Mr. Kenyon Parker and Mr. Willcock, contra.

*Nov. 12th.
Judgment.*

VICE-CHANCELLOR:—

When this case was before me, on the 31st of July last, I refused a motion similar in substance to the present, without entering into the merits, upon the express ground, (which was taken by the Defendant), that the Rolls Order of the 20th of July gave the Plaintiff all he asked, and that, whilst that order remained in force, the Plaintiff, who had obtained the order, had no right

to apply for a repetition of it. Whether that was right on my part, I need not now consider. But, if I erred, my error will make rather for than against the Plaintiff, for it will entitle him to have this case considered as a rehearing of his motion of the 23rd of July. As it is, I shall consider the present motion as a new motion, and treat it as if I had heard it in the first week of August.

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 MATTHEWS
 v.
 CHICHESTER.
 Judgment.

As matter of indulgence, I think I ought to restore the bill, and give the Plaintiff leave to amend it. The 46th Order of May, 1845, (a repetition, in substance, of the previous order of August, 1841 (*a*), gives the Plaintiff twelve days from the time of filing the demurrer within which to decide whether he will set down the demurrer for argument, or serve an order for leave to amend. If he do neither, the demurrer is allowed, and the bill is out of Court. But, in order that the Plaintiff may have notice when the demurrer is filed, the 23rd Order of the 26th October, 1842, requires the Defendant, on the same day on which he files his demurrer, to give notice thereof to the solicitor of the adverse party—the Plaintiff. In this case the demurrer was filed on the 6th of July, but the notice was not given until the 7th; on the 18th, the twelve days from filing the demurrer expired, being only eleven from the time of the notice required by the 23rd Order of October, 1842. The next day was a Sunday; and, if the Plaintiff had, on the Monday, applied to me to restore his bill, upon the ground that the Defendant's irregularity, in omitting to give notice of the demurrer being filed on the 6th of July, had deprived him of one out of the twelve days allowed him by the practice of the Court to determine on the course he should pursue, I

(a) See Order XXXIV of August, 1841, Beavan Ord. Can. 174.

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 Judgment.

should, as a matter almost of course, have given him his order. Instead of taking that course, he took a course which it is admitted is erroneous, and it is now (which I treat as the first week in August) that he makes a proper application, of which he might have given notice on the 20th of July, by leave, if not otherwise. The only question is, whether he is to lose his bill by reason of this blunder? I think not. Where a plaintiff makes a mistake in the regular prosecution of his suit, it may be right that he should bear the consequences of his own mistake. But the mistake which, in this case, is said to deprive the Plaintiff, on the 4th of August, of an order to restore his bill, which he certainly would have got from me in July, is not a mistake in the regular prosecution of his suit, but a mistake in his endeavours to extricate himself from difficulties into which the irregularity of Defendant has forced him,—the mistake is not in prosecuting his suit, but in restoring himself to a condition to do so. I think such a mistake should be dealt with leniently, especially where the indulgence asked will decide no right, but merely enable a Plaintiff to try his right.

*Appeal to the
 Lord
 Chancellor.*

The Defendant appealed to the Lord Chancellor.

The case was argued for the Appellant, on the question of the power or jurisdiction of the Vice-Chancellor to restore the bill, or give the Plaintiff leave to amend his bill, after the time appointed by the General Orders of the Court had expired. The stat. 8 & 9 Vict. c. 105, was referred to on that point (a). The Lord Chancellor discharged the order made by the Vice-Chancellor.

(a) See *Medhurst v. Allison*, 4 Harc, 479.

1846.

HUGHES v. WILLIAMS.

4th June.

MR. FREELING applied to the Court for a direction to the Clerk of Records and Writs, to file the answer of a Defendant in this cause. The difficulty had arisen from an opinion entertained in the office, that according to the proper construction of the Order XLIII of May, 1845, whereby it is ordered that all commissions to take answers are to be made returnable "without delay," the commission had ceased to be effective if the return thereto was not made at or before the last return day of the term following that in which the commission was issued. The commission in the present case had been issued on the 19th of February, and the answer was returned on the 2nd of June.

The Order XLIII of May, 1845, which directs that commissions to take answers are to be made returnable without delay, does not preclude the answer from being filed, although delay may in fact have occurred.

—
Statement.

The VICE-CHANCELLOR said, that it was not intended by the Order to impose any limit beyond which the return of such commissions could not be made. The object of the Order in making the commission "returnable without delay" was to enable the parties to force on the proceedings. The Plaintiff might attach the Defendant for want of answer, when the time for answering had expired, but the return might still be made.

Judgment.

1846.

23rd Nov.

HANDFORD v. HANDFORD.

Evidence received at the hearing of the cause, and entered in the decree, is not necessarily admissible as against all parties, on inquiries before the Master, under the decree.

THE decree directed various inquiries before the Master. All the parties submitted, that evidence in the cause which had not been opened before the Court at the hearing should be entered as read; but the counsel for some parties desired that the words "saving just exceptions," should, in the decree, be added to the order for entering the evidence.

Argument.

Mr. *Wray* mentioned a case, in which those words had been used, that the Master might not consider that he was bound to receive all the evidence mentioned in the decree.

Judgment.

The VICE-CHANCELLOR refused to introduce the words "saving just exceptions." He said it was plain that the Master was not bound, upon inquiries before him, to admit evidence merely because such evidence appeared on the decree to have been taken at the hearing of the cause. Evidence might be admissible against one Defendant, or for one purpose, and not against another Defendant, or for another purpose. The Master must be governed by the general rules of evidence, and not consider himself bound to receive all the evidence in the decree indiscriminately and for all purposes, only because he has found it in the decree.

Mr. *Romilly*, Mr. *Walpole*, Mr. *Willcock*, and Mr. *Speed*, for other parties.

1846.

GARRARD v. LORD DINORBEN.

4th July.

THIS was a suit for the administration of the estate of the Duke of *Sussex*. There was no real estate. The personal estate had been applied in the payment of the debts by specialty, and simple contract, all of which had been paid in full, together with interest on the debts bearing interest. There remained a surplus of about 10,750*l*. Upon this surplus two claims were made; a claim of 10,000*l*., and interest, due upon a voluntary bond; and a claim for interest, under the Order XLVI of August, 1841, by simple contract creditors whose debts did not by law bear interest. If either of these claims should be satisfied, assets would not be left for the other.

In the administration of assets, a voluntary bond is to be preferred to interest upon debts not by law carrying interest, payable under the 46th Order of August, 1841.

Statement.

Mr. *Russell* and Mr. *Rogers*, for the creditors.

Argument.

The voluntary bond, although as between the obligor and the obligee a specialty debt, does not, as against creditors, stand even so high as a simple contract debt. An obligation created by the testator in his lifetime, is preferred to a benefit given by his will, and, therefore, a voluntary bond takes priority to a legacy; but it is postponed to all claims which either creditors of the obligor are entitled to make against him or his estate.

Mr. *Tinney* and Mr. *Lloyd*, for the executors.

The cases of *Lomas v. Wright* (a) and *Watson v. Parker* (b) were cited.

(a) 2 Myl. & K. 769.

(b) 6 Beav. 283.

1846.

GARRARD

v.

DINORSEN.

Judgment.

VICE-CHANCELLOR:—

The object of the 46th Order was to prevent the injustice which often followed from the decree of the Court preventing the creditor from enforcing his demand at law, and thereby delaying the payment of the debt. The Order, therefore, declares that the creditor shall be entitled to interest upon his debt, out of any assets which may remain after satisfying the costs, the debts established, and the interest payable by law. The interest on the other debts not carrying interest is a bounty given to the creditor out of the fund, which, but for the Order, would have gone to the debtor. The bond, in this case, though voluntary, is still a debt to be paid out of the assets, and the interest upon it was recoverable before the 26th Order.

14th Dec.

HEANLEY v. ABRAHAM.

Notice of motion by one of two Defendants to dismiss the bill for want of prosecution. The Plaintiff thereupon filed a replication to the answer of that Defendant; the other Defendant had not appeared. On the motion being made, the Plaintiff undertook to dismiss the bill against the other Defendant, whereupon the Court refused the motion, but ordered the costs to be paid by the Plaintiff.

TWO Defendants were named. One Defendant answered, and, after the expiration of the time allowed for the next step by the Plaintiff, moved to dismiss the bill for want of prosecution. After the notice, and before the motion, the Plaintiff filed a replication. The other Defendant had not appeared.

Mr. *Metcalf*, for the motion, submitted, that the replication to the answer of one of two Defendants was not any advance in the proceedings, and was no answer to the motion. The replication was not in the form required by the 93rd Order of May, 1845, providing for the manner in which the cause was to be proceeded with against the other party. By the 93rd Order, the Plaintiff could only file one replication; and filing that

replication to the answer of one Defendant only was placing an impediment in the way of the cause, and not advancing it.

Mr. *Glasse*, for the Plaintiff, undertook to dismiss the bill against the other Defendant.

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HEANLEY
v.
ABRAHAM.
Argument.

VICE-CHANCELLOR:—

Judgment.

That removes the difficulty. Upon that undertaking no order on this motion; except an order that the costs be paid by the Plaintiff.

RANKEN *v.* HARWOOD.
RANKEN *v.* BOULTON.

7th, 8th, &
18th July.

ON the 25th of November, 1845, *Thomas Kirk* brought his action against *Benjamin Harwood*, and recovered judgment. Judgment was signed on the 9th of December, 1845, and thereupon a writ of *fi. fa.* was, on the 10th of December, delivered to the sheriff of *Middlesex*, to which writ the sheriff returned *nulla bona*. On the 2nd of April, 1846, a writ of *fi. fa.* on the same judgment, endorsed to levy 522*l.* 9*s.* 8*d.*, was sued out, directed to the sheriff of *Surrey*, and, on the 7th of April, the latter writ was placed in the hands of the officer of

A creditor recovered judgment, and sued out a writ of *fi. fa.* thereupon, in the lifetime of his debtor, and placed the writ in the hands of the sheriff on the day after the debtor died. A decree was afterwards made in the suit of an equitable mortgage of certain parts of the real and personal estate of the debtor against his devisee and executor, for the sale of the mortgaged property, and if the proceeds of such sale should be insufficient to satisfy the Plaintiff's debt, then for an account and application of the general personal and real estate of the testator, in a due course of administration. After this decree the judgment-creditor levied, under the *fi. fa.*, on goods left by the debtor. The executor thereupon moved for an injunction to restrain execution, which the Court refused on two grounds—first, because the decree for an account and administration of the general estate was not absolute, but was conditional on the mortgaged property proving insufficient to satisfy the Plaintiff's demand; and secondly, because the judgment-creditor acquired a right to the goods of the debtor, by virtue of the writ of *fi. fa.*, from the testate of the writ, and therefore paramount to the right of the executor.

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 ———
Statement.

the sheriff of *Surrey* for execution. On the 6th of April, the day before the last writ was delivered to the sheriff, *Benjamin Harwood* died.

In April, 1842, during the lifetime of *Benjamin Harwood*, a suit had been instituted by the Plaintiff, who was an equitable mortgagee by deposit of deeds or instruments of certain leasehold premises and shares, and was second mortgagee of freehold and other property, against *Benjamin Harwood*, the mortgagor, and certain trustees for sale of the same property, appointed by a deed, to which *Harwood*, the other mortgagees, and the Plaintiff, were parties. The bill prayed an account of what was due to the Plaintiff, and payment; or, on default, that the mortgaged property might be sold, and the mortgagees, including the Plaintiff, paid out of the proceeds, according to their priority. Upon the death of *Benjamin Harwood*, the Plaintiff filed his bill of revivor and supplement against *C. Boulton*, the sole acting devisee and executor under the will of *Benjamin Harwood*, praying that the suit might stand revived, and the Plaintiff might have the benefit thereof, and that the Defendant, *C. Boulton*, might admit assets of the estate of *Benjamin Harwood*, or that the necessary accounts might be taken of his real and personal estate, come to the hands of the Defendant, and that the same might be applied in payment of the Plaintiff's debt, and of the other specialty creditors of *Benjamin Harwood*, in a due course of administration.

The Defendant, *C. Boulton*, the executor, by his answer to the supplemental bill, stated, that the personal estate of *Benjamin Harwood*, when entirely realised, would not, as he believed, produce 100*l.*; that *Benjamin Harwood* was, at the time of his death, a prisoner for debt, subsisting on the county allowance; and that

he had no real estate whatsoever, except that comprised in the mortgage.

On the 6th of June, 1846, a decree was made in both causes, and thereby, after directing an account of what was due to the Plaintiff and the other mortgagees respectively, it was by consent ordered, that the whole of the freehold and copyhold hereditaments, and the leasehold premises and shares, should be sold; and, after giving the Plaintiff liberty to bid, and providing for the payment of the purchase-money in the several events of the property being sold with or without the concurrence of the first mortgagees, or of the Plaintiff, or any other parties becoming the purchasers, it was ordered, that if the monies which should arise, and which, in respect of the rents and profits received by, or on account or for the use of, the Defendants, (the trustees for sale), should be paid into Court, as thereinbefore directed, should not be sufficient to pay unto the Plaintiff what was due to him upon his said securities, including the costs; and if the Defendant, *C. Boulton*, should not admit assets of *Benjamin Harwood*, the mortgagor and testator, come to his hands, sufficient to pay what might remain due to the Plaintiff for principal, interest, and costs, upon or in respect of his said securities; then the Master was to take an account of the personal estate of *Benjamin Harwood*, come to the hands of the Defendant, *C. Boulton*, &c. And it was ordered, that the Master should also take an account of what was due for the said testator's specialty debts and funeral expenses. And the Court did thereby order and decree, that the said personal estate should be applied in payment of what should remain due to the said Plaintiff for principal, interest, and costs on his said securities, and of what should be reported due on the other specialty debts of the testator, and funeral expenses, in a due course of administration;

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 —
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 ———
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and in case the said personal estate should not be sufficient for that purpose, then the Master was to inquire and state whether the testator, at the time of his death, was seised of or entitled to any freehold or copyhold estate, other than those comprised in the said securities of the Plaintiff; and if he should find that the testator was so seised or entitled, then the Master was also to distinguish between such parts thereof (if any) as passed by the will of the testator, from such parts thereof (if any) as did not pass by his will. The receiver appointed in these causes was thereby ordered to pass his accounts before the Master: further directions and costs were reserved, and liberty was given to all parties to apply.

On the 1st of July, the sheriff of *Surrey*, under the writ of *fi. fa.* in his hands, took possession of certain furniture and effects, formerly belonging to *Benjamin Harwood*, which were in his house at *Streatham*, at the time of his death, and had been since locked up in the same house. On the 2nd of July, the Defendants, *Kirk* and the sheriff, were served with notice of the decree of this court, of the 6th of June.

July 8th. The executor of *Benjamin Harwood* now moved for an injunction to restrain the sheriff from proceeding to remove or sell the furniture and effects seized by him under the *fi. fa.*, and to restrain the Defendant *Kirk* from proceeding in the action.

Argument. Mr. *Romilly* and Mr. *Pole*, for the motion.—It is the rule of the Court, when it has taken upon itself the administration of assets, to restrain all proceedings at law against such assets, and permit parties having claims on the estate to come in under the decree. “It is fully

settled," Lord *Eldon* says, in *Drewry v. Thacker* (a), that "a creditor seeking, and *not having yet obtained*, satisfaction at law, shall not be suffered to proceed there." And, again, in the same case, "After a decree for the administration of assets, those who make a demand which *they have yet to recover* against those assets must come in under that decree" (b). The Court does not, in thus administering the assets, deprive the creditor of any legal right which he has acquired, but it enables him to bring into equity all his legal rights. *Whittaker v. Wright* (c). If, therefore, it be the fact, which the Plaintiff does not admit, that the judgment creditor has acquired a right to these goods, under the writ of *fi. fa.*, the effect of the injunction will not be to deprive him of that right, but the Court will give effect to it, under the decree. It was not only the right, but the duty of the executor, to apply to this Court for the protection of the assets, against the proceedings at law. *Clarke v. Earl of Ormonde* (d): the case of *Lee v. Park* (e) was also cited.

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 HARWOOD.
 RANKEN
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 —
Argument.

Mr. *Rolt* and Mr. *J. H. Taylor*, for *Thomas Kirk*, the creditor.—The case on which the Court restrains proceedings is where they are brought against the executor. The present proceeding is not against the executor. The goods of the testator were bound at the teste of the writ; the creditor then acquired a perfect right to take the goods in execution, and that right is not defeated by the death of the testator. *Bragner v. Langmead* (f), *Fann v. Atkinson* (g), *Calvert v. Tomlin* (h), and the cases cited 1 Wms. Saunders, 219 f, 5th ed. According to the

(a) 3 Swans. 544.

(b) *Ib.*

(c) 2 Hare, 310.

(d) *Jac.* 108.

(e) 1 Keen, 714.

(f) 7 T. R. 20.

(g) Willes, Rep. 427.

(h) 5 Bing. 1.

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RANKEN
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—
Argument.

common law, the goods belonging to the debtor at the date of the writ might have been taken by the sheriff, even in the hands of a subsequent purchaser (a). *Boucher v. Wiseman* (b). The stat. 29 Car. 2, c. 3, s. 16, was passed to remedy the inconvenience of that rule; and by that statute it is provided, that the writ shall not bind the goods, but from the time of its delivery to the sheriff: this act has been construed to extend only to protect purchasers (c). This, moreover, is not the case of an ordinary creditor's suit: there is no decree for the benefit of all the creditors. The amount of debts, as in a general administration suit, is under this decree to be taken only in case the estate shall be insufficient to pay the Plaintiff his debt; and it is impossible, upon a contingent decree of that nature, to restrain the proceedings at law, which may be the only proceedings of which the creditor can have any benefit (d).

July 18th.

VICE-CHANCELLOR:—

Judgment.

The state of the case appears to be this:—At the death of the testator, *Kirk*, the creditor, had an option to sue out a scire facias against the executor, or (passing by the executor altogether, and by force of the proceedings had in testator's lifetime) to take in execution *Harwood's* goods in whosoever hands they might be,—even in the hands of the executor himself. *Kirk* has chosen to pursue the latter course; and the question is, what is the position of the executor with respect to the assets? To explain this—let it be supposed that the writ, which issued on the 2nd of April, had been put into the hands of the sheriff in the lifetime of *Harwood*. In that case,

(a) *Anon.*, Cro. Eliz. 174. 5th ed.(b) *Id.* 440.(d) See *Brooks v. Reynolds*,

(c) 1 Wms. Saunders, 219 g, 1 Bro. C. C. 183.

the goods would have been bound at, and ever since, the death of the testator. There never could have been an instant of time during which the executor could have dealt with the assets, unless in market overt, (an exception in favour of purchaser only), so as to have prevented *Kirk* from taking them in execution. If the executor had sold them by private contract, to raise money for any purpose of administration, or had delivered them to a creditor of testator in satisfaction of a debt, *Kirk* might have followed them. And this *Kirk* might do, without noticing the executor. It is, therefore, strictly true, (whatever the consequences may be), that at the death of the testator, supposing the writ to have been then in the hands of the sheriff, *Kirk* had a dominion over the goods paramount to that of the executor; or, in other words, the amount of the assets of the testator, over which the executor had dominion adverse to *Kirk's* right, was the amount of the gross assets, minus the amount of *Kirk's* claim. On this point I may refer to *Viner's* Abridgment, tit. "Execution;" 1 *Saunders*, 219, where I believe the whole law on the subject is stated. The circumstance that the writ was not put into the hands of the sheriff until the death of *Harwood* does not (in point of reasoning) make any difference, because the writ, when put into the hands of the sheriff, took effect as from the teste of the writ, and was effectual by means of the proceedings had in the testator's lifetime.

A further observation to be made in considering the case is this:—The creditors have no equity independent of the decree. However courts of equity may encourage suits for the general administration of estates, because they produce equality amongst creditors, the equity arises wholly out of the decree. The decree is said to be a judgment for benefit of all the creditors; and the Court stays proceedings at law only because that decree

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cannot be carried out if the creditors are allowed to proceed at law. I should state, however, that I do not regard the above observations as necessarily conclusive upon the question before me. I have no doubt that a creditor, who, at the death of the testator, was in the same position as *Kirk*, might, for the purposes of a motion like this, be held to have lost his advantage by delay, in prosecuting his rights at law, and, perhaps, by other circumstances. But the case I have to deal with is one in which the creditor, having by diligence got a judgment against the testator in his lifetime, has actively prosecuted that judgment in a way which gives him the right I have already adverted to. The rights and powers of the executor are, from the beginning, subject to the rights which the diligence of the creditor has thus conferred upon him in the lifetime of the testator; and the assets which the executor has the power to bring for general administration are subject to these rights. In the case of *Lee v. Park (a)*, Lord *Langdale* appears to have doubted Lord *Eldon's* intimation of the law in *Clarke v. Lord Ormonde (b)*, which, if Lord *Langdale's* doubt be well founded, is in favour of the creditor here. Some important observations upon that head are to be found in Lord *Lyndhurst's* judgment in *Vernon v. Thellusson (c)*.

I can find no case in which the point has arisen; but I cannot think I ought, in such a case as the present, to deprive a creditor of the benefit the law gives him. Being of this opinion on that point, I shall abstain from saying whether the circumstance that the decree is contingent does not lead necessarily to the same conclusion.

(a) 1 Keen, 714.

(b) Jac. 108.

(c) Phil. 406. See *Gilcs v.*

Grover, 9 Bing. 128, 158, which was not cited in the argument.

Motion referred, with costs, to be paid by the Defendant, the executor, to the judgment creditor and the sheriff; but the costs of the executor, and the costs paid by him, to be costs in the cause.

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RANKEN
v.
HARWOOD.
RANKEN
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BOULTON.

The motion for the injunction was reheard before the Lord Chancellor, on the 25th of July, 1846, when his lordship, without expressing any opinion on the question, whether the writ of execution sued out by the creditor gave him a right to the goods paramount to that of the executor, refused the motion, upon the form of the decree, which did not give the plaintiff an absolute or unconditional right to go in and prove his debt.

*Appeal to the
Lord Chan-
cellor.*

ROBERTSON v. SOUTHGATE.

19th & 20th
November.

THE bill was filed by *Robertson* on the 6th of December, 1843, against *James Webb Southgate* and *Henry Southgate*, and sought a declaration that articles of partnership made between *Robertson* and *Henry Southgate* might be declared fraudulent and void. On the 14th of December, 1843, before his answer had been put in, *Henry Southgate* became bankrupt. On the 4th of January, 1844, a joint fiat in bankruptcy issued against *Robertson* and *Henry Southgate*, as partners, under which *Harmer* and *Woodman* were chosen assignees. The separate fiat against *Henry Southgate* was afterwards annulled by the Court of Review, and the proofs and

Where a Defendant becomes bankrupt before he has answered the bill, and a supplemental bill is filed by the Plaintiff against the assignees of the bankrupt Defendant, stating the bankruptcy, it is not proper for the Plaintiff, after filing such supplemental bill, to issue process to compel the bankrupt himself to

answer the original bill. It is the same where both the Plaintiff and Defendant become bankrupt before the Defendant has answered the bill, and the supplemental bill is filed by the assignees of the Plaintiff against the assignees of the Defendant. The clerk of record and writs will, in such cases, give the usual certificate for setting down the cause, without any answer from the bankrupt being on the file.

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 —
Statement.

proceedings transferred under the joint fiat. Both of the bankrupts obtained their certificates. In June, 1845, certain of the creditors obtained leave to prosecute the suit in the names of the assignees. In March, 1846, the original bill was amended; and a supplemental bill was filed in the names of *Harmer* and *Woodman*, the creditors' assignees, against *James Webb Southgate*—the official assignee being also made a Defendant, praying that the Plaintiffs might have such or the like relief against *James Webb Southgate*, as *Robertson* might have had if he had not become bankrupt, and might have the benefit of the original suit and the proceedings therein. The Plaintiffs in the supplemental bill then issued an attachment in the name of the Plaintiff in the original suit against the Defendant, *Henry Southgate*, for want of his answer to the original bill.

Argument.

Mr. *Romilly* and Mr. *Torriano* moved to discharge the attachment, or stay the proceedings against the Defendant, *Henry Southgate*. The answer of the bankrupt could not aid the Plaintiff. His interest had entirely passed to his assignees, who were parties to the suit; and he is no longer a necessary party. In such a case, it is irregular, and an abuse of the process of the Court, to sue out an attachment for want of answer against the bankrupt. The irregularity is, moreover, aggravated by the fact, that the process is taken out at the suit of a Plaintiff who has himself become bankrupt. They referred to *De Minchwitz v. Udney (a)*, as to the difficulty of raising the fact of bankruptcy by way of defence.

Mr. *Kenyon Parker* and Mr. *Green*, for the Plaintiffs.—It is necessary that the bankruptcy should ap-

(a) 16 Ves. 466.

pear on the record in the original suit. As the case stands, the clerk of records and writs would not deliver his certificate, to enable the Plaintiffs to set down the cause, inasmuch as it would appear that one of the Defendants had not answered the bill, and, therefore, that the bill was incomplete. The Defendant might, by a plea or a short answer, state the fact of his bankruptcy. The formal and proper course for the Defendant is to plead his bankruptcy. *Turner v. Robinson* (a). The fact then appears, and the Plaintiffs can proceed regularly with the suit. The bankruptcy does not cause an abatement. *Lee v. Lee* (b). The Plaintiffs may still proceed to make the pleadings perfect: thus, it has been held that the bankrupt's answer, filed before the bankruptcy, may, after the bankruptcy, without any irregularity, be refused for scandal and impertinence. *Booth v. Smith* (c). The Plaintiffs proceed in their character of assignees of the original Plaintiff: they are entitled to the benefit of the proceedings which had been taken before the bankruptcy; and one incident is, their right to use the name of the bankrupt Plaintiff, so far as may be necessary, to perfect the record.

1846.
 ROBERTSON
 v.
 SOUTHCATE.
 Argument.

VICE-CHANCELLOR:—

This is an application by the Defendant to discharge an attachment issued against him for want of an answer, or, in the alternative, to stay the proceedings against him. It appears that the Defendant became bankrupt before putting in his answer. On the bankruptcy of a defendant, the plaintiff may, without being irregular, call for an answer, and thereby put the defendant to insist

Nov. 21st.
 Judgment.

(a) 1 Sim. & Stu. 3.

(b) 1 Hare, 617.

(c) 3 Sim. 639.

1846.
ROBERTSON
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—
Judgment.

upon his bankruptcy by plea or answer. But if, in such a case, the plaintiff, instead of proceeding on the record as it stands, files a supplemental bill against the assignees of the bankrupt in that character, it is not regular—at least it is not proper—for the plaintiff, after taking that step, to sue out process of contempt against the bankrupt for want of his answer to the original bill in which the bankruptcy is not in issue. The proceeding is not consistent with the fact, which is put upon the record by the supplemental bill—the fact of the bankruptcy. Nor is the proceeding in any way necessary, for when the bankruptcy thus appears, the clerk of records and writs, as a matter of course, will issue the usual certificate for setting down the cause without the bankrupt's answer. So, where the plaintiff and defendant both become bankrupt, and different assignees are appointed, and a bill is filed by the plaintiff's assignees against the defendant's assignees, to have the benefit of the suit. In the case before me, the same persons are assignees, both of the bankrupt Plaintiff, and of the bankrupt Defendant; and there is no doubt, that, before the supplemental bill was filed, proceedings to compel an answer in the original cause might have been taken; but after the supplemental bill is on the file, the assignees cannot properly proceed in the original cause, in which the bankruptcy is not in issue, against the bankrupt, whose rights and liabilities they state by their bill are transferred to them by the bankruptcy. But, though it may not be proper for a party who puts upon the record the fact of the bankruptcy of another to take proceedings in the name of, or against, the alleged bankrupt, as if no bankruptcy had happened, it does not of course follow, that the alleged bankrupt may not proceed in his own name. It is not because a person files a bill, as supplemental to an existing suit, stating that a party had become bankrupt, that there-

fore the alleged bankrupt is prevented from proceeding in the original cause. I, therefore, thought it right to inquire, whether, in the present case, the attachment which issued in the name of the bankrupt Plaintiff in the original cause, was the act of the Plaintiff, insisting upon his own right to proceed, and disputing the right of the assignees to treat him as a bankrupt; or, whether the proceeding was that of the assignees. It was properly admitted, that it was in truth the act of the assignees. The solicitor of the Plaintiff is now the solicitor of the assignees. The two suits are one. The attachment, it appears, was issued out upon the supposition, that it was necessary to obtain from the Defendant an answer in the original suit, to enable the assignees to prosecute that suit, as it was said the clerk of records and writs would not grant the usual certificate without it. It is now admitted that he would give the usual certificate in the case I have first suggested: I cannot myself discover any distinction in substance between the two cases. The proceeding in a case like the present, is no more behind the back of the alleged bankrupt, than in the case I have suggested. But, without saying the proceeding is, technically speaking, irregular, I think it is not proper for the assignees to take the step now complained of. The motion should, however, have been made both in the original and supplemental causes. It was said, that this could not be done, because the Defendant now moving is not so connected with the supplemental suit as to entitle him to move in it; but that is not so as a question of practice. It is the common case of a supplemental bill, filed to make the suit perfect in consequence of the bankruptcy which the assignees suggest and the bankrupt admits. The Defendant is entitled to an order on his motion, if the motion be made in both suits. I think the right course will be, not to discharge the order for irregularity, but to stay

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SOUTHGATE.

Judgment.

the proceedings. I give the Defendant leave to amend the notice of motion, by intituling it in both causes; it must stand over for that purpose, and the assignees must be served with the amended notice. I put the case upon this ground, that, after the fact of the bankruptcy has been put upon the record by the assignees, they ought not to proceed in the original suit as if there were no bankruptcy.

20th Feb.

THATCHER v. LAMBERT.

Mode of altering and correcting the title of an answer, which purports to be the answer of several Defendants, where such answer has been sworn by some of such Defendants, but the others refuse to join in it.

ONE of several Defendants, for whom an answer had been prepared to be put in jointly with other Defendants, refused to concur in the answer, or put in an answer alone, and stood out process to contempt. The joint answer had been sworn by the other Defendants; but the clerk of records and writs would not file the answer, unless it was sworn by all the Defendants whose answer it purported to be.

Argument.

Mr. *Rogers* moved that the answer might be filed by order, as the answer of *L.*, *M.*, and *N.*, the Defendants, who had in fact answered.

Judgment.

The VICE-CHANCELLOR refused to make the order.

The course suggested in the Record Office, and afterwards pursued, was that of striking out the name of the dissenting Defendant, and reswearing the answer by the other Defendants.

1846.

WOODS v. WOODS.

25th July.

THIS case is reported on different points in 1 Mylne & Craig, 401; 10 Simons, 197; 3 Hare, 411; and 4 Hare, 83.

The suit was by the children of *Robert Woods*, to set aside a sale and conveyance of his real estate by his widow, and *Thomas Woods*, whereby *Thomas Woods* had become the purchaser. The widow and *Thomas Woods* died after the institution of the suit. *Thomas Woods* devised the estate in question to trustees, for the benefit of his family; and the suit was prosecuted by supplemental bill against the parties taking the estate under the will of *Thomas Woods*. The cause was heard on the 14th, 15th, 16th, 17th, and 19th of July; when the bill was dismissed with costs.

On the dismissal of a bill with costs, the Court referred it to the Master to inquire and state whether it was necessary or proper that several Defendants, consisting of trustees and their cestui que trusts, appearing by the same solicitor, and having no conflicting interests, should have filed two separate answers to the bill.

Reference to the Master, under the 122nd Order of May, 1845, to distinguish the parts of a cross bill which were of unnecessary length, and to ascertain the costs thereby occasioned.

Argument.

Mr. *Anderdon* and Mr. *Shebbeare*, for the Plaintiffs, said, that the devisees in trust and parties beneficially interested under the will of *Thomas Woods*, appearing by the same solicitor, and having in all respects a common defence, had thought proper to sever in their answers, and had unnecessarily increased the expense of the suit, by filing two answers of great length, instead of one answer, which would have been sufficient for their defence. They also said, that Defendants had filed a cross bill for discovery, in which they had set out, with unnecessary prolixity, the statements in the original and supplemental bills and answers. They, therefore, submitted, that under the Order XXVII of April, 1828, the Court would make such a direction, as would protect the Plaintiffs from the unnecessary costs

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Argument.

of the separate answers: *Farr v. Sheriffe* (a). And that, under the Order CXXII of May, 1845, the Court would take notice of the unnecessary length of the cross bill, and direct the Taxing Master to ascertain the costs thereby occasioned to the Plaintiffs.

Mr. *Stuart*, Mr. *Koe*, and Mr. *Miller*, for the Defendants, argued that in a case so entirely adverse, not founded on the construction of any doubtful instrument, or the execution of any existing trust, it was competent to every Defendant, if he thought proper, to answer separately; and they denied that the cross bill contained statements not material as a foundation for the interrogatories.

Judgment.

The VICE-CHANCELLOR said, the case of *Farr v. Sheriffe*, with respect to costs, did not, in specie, apply to the question in the present case. The observations of Lord *Eldon* in *Vansandau v. Moore* (b), were very important in a case of this kind. It was impossible for the Court to lay down any general rule that Defendants should not sever in their defence, or which should compel Defendants, standing in a certain relative position with reference to the question in the cause, to appear together; but the Court could say, that if Defendants, in certain cases, thought proper unnecessarily to sever in their defences, they should not be allowed the additional costs thereby occasioned. This, Lord *Eldon* in that case (c) says, the Court is never called upon to do earlier than at the hearing of the cause. And, he adds, —“When the cause comes to be heard, it will be the duty of the Court to consider attentively and anxiously, what was unnecessary expense, and to visit that unne-

(a) 4 Hare, 528

(b) 1 Russ. 441.

(c) Id. 454.

cessary expense upon those who have created it" (a). In the case of *Walsh v. Dillon* (b), it appears that the Court referred it to the Master to inquire whether it was necessary, to protect the rights of several Defendants appearing by the same solicitor, that they should have answered separately. In this case, the original bill was filed against *Thomas Woods*, who put in his answer, and afterwards died, having devised his estate to several trustees, upon trusts for the benefit of parties, who, with the trustees, are Defendants to the supplemental suit. The Defendants have filed two long answers: one by the trustees, and another by the cestui que trusts. I do not see any sufficient reason for separate answers, and I shall follow the case of *Walsh v. Dillon*.

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 Judgment.

Upon the point relating to the alleged prolixity of the cross bill, I think it is a case in which I ought to act upon the 122nd Order.

It appearing to the Court that the Defendants, the devisees of *Thomas Woods*, appearing by the same solicitor, and having no conflicting interests, have answered separately, refer it to the Master to inquire, and state to the Court, whether it was necessary or proper on any account, that the said Defendants should answer separately; and if the Master should find that it was necessary or proper, let him state the grounds upon which he shall have come to that conclusion; and refer it to the Master to look into the cross bill, and distinguish what parts thereof are of unnecessary length, and ascertain the costs occasioned thereby to the Defendants thereto.

Minute.

THE Defendants accepted one set of costs, and the reference, with respect to the several answers, was therefore not directed.

(a) 1 Russ. 456.

(b) Note to *Reade v. Sparkes*, 1 Moll. 13.

1846.

5th, 6th, &
11th Nov.

DUNCOMBE v. LEVY.

Bill by a debtor, who had conveyed property to a trustee for the benefit of his creditors, to have the trusts of the deed administered by the Court, charging that one of such creditors had forfeited his debt by a breach of his covenant not to sue or molest the debtor:—*Held*, that the creditors, parties to the deed, other than the trustee and the creditor charged with the breach of covenant, were sufficiently made parties by being served with copies of the bill under the 23rd Order of August, 1841.

A court of equity will declare and give effect to a forfeiture, where such forfeiture is incidental to the administration of a trust.

Statement.

THE bill stated that the plaintiffs, having become liable to the defendant, *Laurence Levy*, for the amount of a bill of exchange, *Levy* recovered judgment against them for 1346*l.* 12*s.* 6*d.*, and sued out execution, under which part of the debt was levied, leaving 1160*l.* still due; that, by an indenture, dated in August, 1843, made between the plaintiffs of the first part, *John Carlon, R. J. Hitchcock, T. Vincent, Elizabeth Levy, Laurence Levy, A. Daniels, C. King*, and *R. Hodgson*, of the second part, and *John Carlon* of the third part, reciting that the plaintiffs were indebted to *John Carlon*, 12,577*l.* 12*s.* 8*d.*, *R. J. Hitchcock*, 3750*l.*, *T. Vincent*, 1950*l.*, *Elizabeth Levy*, 2150*l.*, *Laurence Levy*, 1160*l.*, *A. Daniels*, 1000*l.*, *C. King*, 6400*l.*, *R. Hodgson*, 100*l.*; and that the plaintiffs were also indebted to the defendant, *John Carlon*, in the further sum of 1080*l.* 5*s.* 4*d.*, in consideration of the said debts, and in consideration of the letter of license thereafter contained, the plaintiffs conveyed and assigned certain property, therein mentioned, to the said *John Carlon*, upon trust for himself and the said several parties thereto of the second part, in proportion to the amount of their said several and respective debts, and to secure the payment thereof *pari passu*, and in proportion to the several amounts thereof; and that the said defendants, *John Carlon, R. J. Hitchcock, T. Vincent, Elizabeth Levy, Laurence Levy, A. Daniels, C. King*, and *R. Hodgson*, by the same indenture, severally and respectively gave and granted unto the plaintiffs free and full liberty, license, and authority, to attend to, follow, conduct, and manage all and every their and each of their affairs and concerns, and to transact and attend to any affairs, matters, or things whatsoever, at any place or places within

the United Kingdom, at their, his, or her free will and pleasure, and without any let, suit, action, arrest, attachment, or other impediment or molestation to be offered or done unto them, him, or her, respectively, or their, his, or her respective lands, tenements, or hereditaments, goods, chattels, monies, estate, or effects whatsoever, by them the said several parties thereto of the second part respectively, or by any or either of them, or by their or any or either of their means, contrivance, assent, or procurement, until the 1st of May, 1846; and the same parties covenanted that they would not, during the time or period aforesaid, sue, arrest, attach, or prosecute the plaintiffs, or either of them, or institute or prosecute any suit or proceeding, legal or equitable, against them or either of them, for or on account of their or any or either of their said respective debts, or any part thereof respectively; and, moreover, that if any such action, arrest, attachment, prosecution, suit, or proceeding as aforesaid, should be commenced, taken, or prosecuted against the plaintiffs, or either of them, or their or either of their persons or person, lands, tenements, or hereditaments, goods, chattels, estate, or effects, within the said term or period, by the said defendants, *John Carlon, R. J. Hitchcock, T. Vincent, Elizabeth Levy, Laurence Levy, A. Daniels, C. King, and R. Hodgson*, or by any or either of them, or by any other person or persons, by or through their or any or either of their means, contrivance, consent, or procurement; then the said plaintiffs, or either of them, by virtue thereof, should be thenceforth and for ever acquitted, exonerated, and discharged, both at law and in equity, of and from all and every the debts, claims, and demands whatsoever, owing to each of them the said defendants, *J. Carlon, R. J. Hitchcock, T. Vincent, Elizabeth Levy, Laurence Levy, A. Daniels, C. King, and R. Hodgson*, by whom or by whose order, means, contrivance, consent, or procure-

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ment, they the said plaintiffs, or either of them, their, his, or her lands, tenements, or hereditaments, goods, chattels, monies, estates, or effects, should be so sued, arrested, imprisoned, prosecuted, or damnified; and that the said letter or covenant of license, in any or either of the said cases, should be and operate as a release of and might be pleaded in bar to the same debts, claims, and demands, and to any such action, suit, attachment and prosecution, process, or proceeding as aforesaid.

The bill alleged that the Defendant *Laurence Levy*, notwithstanding the covenant and letter of license, had issued execution on the judgment for the amount of the bill of exchange; and it prayed a declaration that the debt of 1160*l.* had been fully satisfied or discharged by the Defendant *Laurence Levy* having caused the goods and chattels of the Plaintiff to be taken in execution on the 18th of February, 1845; that the Plaintiffs might be exonerated and discharged from the debt; that the Defendant might be ordered to execute proper warrants for entering up satisfaction upon the judgment; and that, if necessary and proper, and for the benefit of the Plaintiffs, the trust deed might be carried into execution under the direction of the Court.

The Defendants, *Laurence Levy* and *J. Carlon*, were served with the subpoena to appear and answer in the usual way. The other creditors, *R. J. Hitchcock*, *T. Vincent*, *Elizabeth Levy*, *Laurence Levy*, *A. Daniels*, *C. King*, and *R. Hodgson*, were served with a copy of the bill, under the Order XXIII of August, 1841.

It appeared, that the Defendant *Laurence Levy* had recovered two judgments against the Plaintiffs, one dated the 2nd of February, 1843, which was the debt secured by the deed; and another dated the 10th of August,

1843, no part of which debt was secured by the deed, and whereupon the Defendant was at liberty to proceed. The case of the Defendant was, that he had instructed his solicitor to take proceedings on the second judgment, and that his solicitor, by mistake, had sued out execution upon the first.

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— —
Statement.

Mr. *Bacon* and Mr. *Hallett*, for the bill.

Argument.

Mr. *Romilly* and Mr. *Southgate*, for the Defendant *Laurence Levy*, objected that all the creditors who were parties to the trust deed, were necessary parties to the suit, and that it was not sufficient to serve them with copies of the bill. [The Court reserved the question of parties, until the question in the cause, that of the forfeiture of the debt, had been argued.] It was then contended, that this Court would not interfere to give effect to a forfeiture; that the Plaintiff could obtain, and had in fact obtained, relief at law; for the judge at chambers had, upon the application of the Plaintiff, ordered the warrant of execution to be cancelled, as having been issued contrary to good faith; and that it appeared that no levy had been in fact made, as the officer was in possession of the property under a prior execution, and the second execution had been lodged and withdrawn while the first was still in force.

VICE-CHANCELLOR,—after stating that the Plaintiff was entitled to have the bill considered as seeking to administer the trusts of the deed under the direction of the Court,—that there was not evidence upon which the Court could come to the conclusion that the proceedings had, by mistake, been taken upon the judgment of the 2nd of February, 1843, instead of that of the 10th of

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 —
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August,—and that the question was, whether the Court should give the Defendant an opportunity of trying that question in an issue, or should at once decide the point against him,—said:—

In this case, I was requested by the Defendant's counsel to express an opinion whether the creditors of the Plaintiffs, parties to the trust deed of the 21st August, 1843, other than the trustee and the Defendant *Laurence Levy*, were properly served with a copy of the bill under the 23rd Order of August, 1841; or whether those creditors ought not to have been served with a subpoena, and to have appeared and answered the bill in the usual way. It may, perhaps, admit of doubt whether a case like this was contemplated by that Order: but the case is within the terms of the Order; for the bill asks relief subject to their claims under the deed; and as the subsequent Orders (*a*) enable them to have the suit prosecuted against them in the common way, if they desire it, it is for their benefit that the Order should be held to apply to them.

In making these observations, it is to be remembered, that I have already expressed an opinion, that the Plaintiffs are entitled to have the suit considered and treated as a suit to administer the trusts of the deed.

Decree.

THE Court directed three issues:—1. Whether the instructions given by the Defendant *Laurence Levy* to *Charles Lewis* as his attorney, in consequence of which a warrant was issued by the sheriff of *Middlesex* on the 18th February, 1845, to levy execution on the judgment which the Defendant *Laurence Levy*, on the 2nd day of February, 1843, in her Majesty's Court

(a) See Orders XXVI and XXVII of August, 1841.

of Exchequer of Pleas, recovered against the Plaintiff *T. S. Duncombe*, for the sum of 1346*l.* 12*s.* 6*d.*, were instructions to levy execution on the judgment which the Defendant *Laurence Levy*, on the 10th August, 1843, in her Majesty's Court of Exchequer, recovered against the Plaintiff *T. S. Duncombe*, in the sum of 1276*l.* 2*s.* 6*d.* only. 2. Whether the Defendant *Laurence Levy*, or any other person or persons, by or through his means, contrivance, consent, or procurement, has, since the date and execution of a certain indenture, dated the 21st August, 1843, and made between the Plaintiff of the first part, and the Defendant *Laurence Levy*, and the other persons therein named, of the second part, and one *J. Carlon* of the third part, and during the term or period in the said indenture mentioned, sued, arrested, attached, or prosecuted the Plaintiffs, or one of them, or instituted or prosecuted some suit or proceeding, legal or equitable, for or on account of his debt in the said indenture mentioned, or some part thereof, against the Plaintiffs, or one of them, or their or any of their person or persons, lands, tenements, or hereditaments, goods, chattels, estate, or effects, contrary to the true intent and meaning of the said indenture. 3. Whether some action, attachment, prosecution, suit, or proceeding, has been commenced, taken, or prosecuted against the Plaintiffs, or one of them, either in their, or one of their, persons or person, lands, tenements, or hereditaments, goods, chattels, estate, or effects, within the term or period in the said indenture mentioned, by the said Defendant, or by some person or persons by or through his means, consent, or procurement, contrary to the true intent and meaning of the said indenture, whereby the Plaintiffs, or one of them, their, his, or her lands, tenements, and hereditaments, goods, chattels, monies, estates, or effects, have been sued, arrested, imprisoned, prosecuted, or damned.

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Decree.

1846.

5th Nov.

HUNTER v. MACKLEW.

A., having a life estate, with remainder over in strict settlement, subject to a mortgage of the settled property for a term of 1000 years, demised the property for a term of 200 years if he should so long live. A purchaser of the term of 200 years filed his bill to redeem the term for 1000 years, who was the first mortgagee of the estate:—*Held*, that A., the owner of the life estate, subject to the term of 200 years, was a necessary party.

BY indentures of lease and release, dated the 14th and 15th of May, 1824, being a settlement made upon the marriage of Sir *Francis Vincent* with *Augusta Elizabeth*, his wife, certain real estates were conveyed to the Earl of *Carnarvon* and the Earl of *Roslyn*, their heirs and assigns, to certain uses therein mentioned, with a proviso, that, notwithstanding any of the said limitations or trusts, it should be lawful for Sir *Francis Vincent*, from and after the decease of Dame *Mary Vincent*, (subject to a certain rent-charge), by any deed to be executed as therein mentioned, to charge a competent part of the said settled estates, or the estates thereafter covenanted to be settled, with any sum, not exceeding 3000*l.*, for furnishing the mansion-house of *Debden Hall*, and to raise the same monies by appointing the said hereditaments for any term of years in possession, unto any person or persons willing to make the advance thereof by way of mortgage, subject to redemption upon repayment of the monies to be charged, and interest at 5*l.* per cent. per annum. Dame *Mary Vincent* died in January, 1826. By indenture, dated the 30th of August, 1826, Sir *Francis Vincent*, in consideration of 3000*l.* lent to him by *H. H. Frazer*, demised the settled estates, under the power in the settlement, to *H. H. Frazer*, his executors, administrators, and assigns, for the term of 1000 years, with a proviso for redemption on repayment by Sir *Francis Vincent*, his heirs, executors, and administrators, or other the person or persons who might be interested in or entitled to the said hereditaments, of the said 3000*l.* and interest. The mortgage debt to *Frazer*, and the securities for the same, were, in

August, 1830, transferred to the trustees of the Provident Institution.

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 —
Statement.

By an indenture, dated the 23rd of March, 1837, Sir *Francis Vincent* granted and demised the same estates to *John Lyde*, his executors, &c., for the term of 200 years, if the said Sir *Francis Vincent* should so long live, subject to the several charges and incumbrances on the life estate of the said Sir *Francis Vincent*, and subject to the said mortgage for 3000*l.*, with a proviso for redemption on payment to *Lyde* of 1987*l.* and interest on the 23rd of March, 1838, and a power of sale on default of such payment. Default was made; and in 1843, the power of sale was exercised, and the Plaintiff became the purchaser of the premises for the residue of the said term of 200 years.

The bill stating the foregoing case, was filed in December, 1845, against the Defendants, the trustees of the Provident Institution, in whom the mortgage of 3000*l.* was vested, under the indenture of 30th August, 1836; and it prayed an account of what was due on that mortgage; and that, upon payment by the Plaintiff to the Defendants of what should be so found due, the Defendants might be decreed to assign or convey the mortgaged premises to the Plaintiff, or as he should direct, and to deliver to the Plaintiff the title-deeds and evidences relating thereto.

The Defendant, *A. Henderson*, one of the trustees of the Provident Institution, by his answer, said, he was advised that Sir *Francis Vincent* ought to be a party to the suit, and that he had been informed there were several other incumbrances on the said mortgaged premises subsequent to the said mortgage of 3000*l.*

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The cause was set down by the Plaintiff under Order XXXIX of August, 1841, on the objection for want of parties.

Argument.

Mr. *Follett*, for the Defendant, in support of the objection. The Defendants represent the first mortgagees. Since their mortgage, a term of 200 years has been carved out of the equity of redemption, or out of the life estate of Sir *Francis Vincent*, which is a part of the equity of redemption; and upon this derivative interest the bill is founded. The Plaintiff therefore cannot have a more extensive right than his mortgagor. Now, what are the rights of the mortgagees upon a bill for redemption filed by the mortgagor? Their rights are, to compel the mortgagor to work out the remedy which he has resorted to, and pay off the mortgagees; or, on default, that the bill for redemption shall operate in favour of the mortgagees, and result in a foreclosure. The mortgagees may require that the suit shall be framed so as to have this effect, whether it be filed by the mortgagor himself, or persons claiming partial interests in the property as second mortgagees. But the suit cannot have this effect unless it is so framed, that all persons interested in the equity of redemption may be bound by the foreclosure, which may be the effect of default of payment. As the suit is now framed, Sir *Francis Vincent* would not be bound by the result of this suit: *Farmer v. Curtis* (a), *Anderson v. Stather* (b). The other incumbrancers referred to, both in the bill and answer, as having charges on the mortgaged premises, or on the life estate of Sir *Francis Vincent* therein, are also necessary parties on the same grounds, all of them having interests carved out of the equity of redemption.

(a) 2 Sim. 466.

(b) 2 Coll. 209.

Mr. *Southgate*, for the Plaintiff.—The objection must be confined to Sir *Francis Vincent* alone: the suggestion in the answer with regard to the other incumbrancers is not so made, as to entitle the Defendants to call upon the Court in this stage of the cause for a decision of that question. With regard to Sir *Francis Vincent*, the objection assumes that a second mortgagee is not entitled to pay off or redeem a first mortgagee, without the concurrence of the mortgagor. This is contrary to the authorities: *Smith v. Green* (a). The ground upon which *Farmer v. Curtis* and the case of *Fell v. Brown* (b) is put by the Vice-Chancellor *Knight Bruce*, in his judgment in *Anderson v. Stather* (c), does not apply to this case.

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 v.
 MACKLEW.
 Argument.

Mr. *Follett*, in reply, submitted, that if the facts upon which an objection for want of parties arose, appeared upon the pleadings, the suggestion that there were necessary parties absent, was sufficiently made by the answer, to enable the Court to determine the question upon this argument.

VICE-CHANCELLOR :—

The only objection which I have now to consider is, the objection that Sir *Francis Vincent* ought to be a party. A mere statement of facts, from which it might appear that other persons are necessary parties, without pointing out the parties required, is not such a suggestion of a defect of parties as amounts to an objection within the meaning of the 39th Order.

Judgment.

Under a power created in the settlement of the estate, it appears that Sir *Francis Vincent* was enabled to charge the estate with 3000*l.*, in priority to all other charges

(a) 1 Coll. 555. (b) 2 Bro. C. C. 276. (c) 2 Coll. 212.

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 Judgment.

except one. The power was accordingly exercised. The equity of redemption, as I understand it, was vested in Sir *Francis Vincent* for life, with remainders over in strict settlement. Sir *Francis Vincent* then creates a term of 200 years by way of mortgage on his life estate, and gives the mortgagee a power of sale: that power of sale has been exercised. The interest of Sir *Francis Vincent* in such a case may be very small; but it cannot, I think, be disregarded. In strictness, he is a necessary party. In principle, there is no difference between two hundred years and twenty years.

Objection allowed, with costs.

1845.
 6th & 8th
 December.

CURLING v. FLIGHT.

To a vendor's bill for specific performance of a contract to purchase shares in mines, insisting that the Plaintiff was not bound to give other evidence of his title to the shares than attested extracts from the cost-books or registers of the mines, and that the Defendant had refused to accept such evidence,—but not alleging that the Plaintiff was unable to give other evidence of his title,—the Defendant demurred:—*Held*, that, as the Plaintiff was not precluded from giving other evidence of his title if necessary, the demurrer must be overruled.

SEVERAL shares, or parts of shares, of copper, lead, and tin mines in *Wales* and *Cornwall*, were offered by the Plaintiff for sale by auction, in October, 1844, at the Auction Mart, in the city of *London*, and the Defendant was the highest bidder for eight lots, described as follows:—One 192nd part or share in the Tre-savean mine, in the district of *Gevennap*, in *Cornwall*; one 274th part or share in Wheal Jewel Copper Mine, in *Gevennap*; one 274th part or share in ditto; three fourth parts of a 94th part or share in East Wheal Crofty Mine, in *Camborne* district; one 200th share in Botallack Tin and Copper Mine, near *Land's End*; one 100th part or share in the Goginan Lead Mine, in the district near *Aberystwith*; one 100th share ditto; five 1000th parts or shares in *Stray Park* and

Camborne Vean Copper Mines. After the sale, the Defendant's solicitor applied to the Plaintiff's solicitor for an abstract of the title. The Plaintiff's solicitor answered, that it was not the custom on the sale of mining shares for the vendor to deliver an abstract of any other evidence of title, than the certificate of the pursuer or book-keeper of the mine; that the vendor is entered and registered as the owner of such shares in the cost book of the mining concern, of which the shares are a part; and that the authorised substitution by the pursuer of the purchaser's name in the cost-book for that of the vendor, and a deed of transfer from the vendor, is all that is necessary. The Defendant's solicitor insisted on the necessity of abstracts; and the Plaintiff's solicitor ultimately (without admitting the Defendant's right to demand it,) furnished him with copies of letters from the pursuers of the several mines, certifying that the Plaintiff's testator was possessed of the shares comprised in the contract, and also an abstract of the will of the testator, under which the Plaintiff was appointed executor and empowered to sell the property. The Defendant's solicitor replied, that the materials furnished were no evidence of the Plaintiff's title. The Plaintiff's solicitor subsequently procured extracts from the cost-books kept as registers of shares in the several mining concerns, that the shares comprised in the contract stood in the name of the testator as the proprietor thereof at the time of his death; and such extracts were attested by the declarations of the pursuers or book-keepers made under the statute 5 & 6 Will. 4, c. 62. The Defendant refusing to accept the documents furnished, as sufficient evidence of the title, the Plaintiff filed his bill for specific performance of the contract, and payment of the purchase-money.

The Defendant demurred.

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v.

FLIGHT.

Argument.

Mr. *Wood* and Mr. *Bacon*, for the bill.

Mr. *Romilly* and Mr. *Rogers*, for the demurrer.—The only question in dispute between the parties is, whether a vendor of mining shares is bound to give any other evidence of his title than the extracts from the cost books of the mines; or whether the purchaser is bound to accept such extracts as conclusive evidence of such title. It appears by the bill that the Defendant has made no other objection, and that, subject to that question, he is willing to complete the contract. In such a case, where the question in the cause distinctly appears upon the bill, the Court would determine that question on the demurrer.

VICE-CHANCELLOR :—

Judgment.

If the vendor, seeking specific performance of a contract in this Court, should state by his bill that he had a certain title, or a title founded upon certain instruments, and that he was not able to give any other title than that which he stated, the Court might, upon the demurrer of the purchaser, decide whether the title stated upon the bill was or was not such a title as this Court would compel the purchaser to take; but when the vendor states only that it is customary, with reference to the subject of the contract, to furnish certain evidence of title, which he has procured or is ready to give, and insists that the purchaser is bound to accept such evidence, without saying that he cannot shew any other title, a demurrer to the bill cannot be sustained. If the Court were to be of opinion that the evidence of title tendered by the Plaintiff was insufficient, still the demurrer could not be allowed, without holding that the mistake of the Plaintiff, in the tender of insufficient evidence of title,

had deprived him of the right of coming for a specific performance of the contract, although, in truth, he had other evidence which would make the title good.

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CURLING
v.
FLIGHT.
Judgment.

Mr. *Rogers* then submitted, that the Court would in such a case, without overruling the demurrer, refer it to the Master to inquire into the title. The answer of the Defendant was not necessary to that reference. *Balmanno v. Lumley (a)*.

Mr. *Bacon* said, that, in *Balmanno v. Lumley*, the Plaintiff had chosen to ask for the reference without waiting for the answer. It was not at the option of the Defendant that the answer would be dispensed with.

Demurrer overruled with costs.

The Defendant then put in his answer. The answer insisted, that any question or inquiry as to the habit or custom of purchasers of mining shares to require only that the title should be deduced or evidenced in a certain way, was wholly irrelevant to the question of law in this case, whether the defendant was not, as he was advised, and insisted, entitled to an abstract of the deed or other constitution, in each case, of the mine or company; and of the title to or interest in the mine itself, with a statement of what had been paid on each share, and of what liabilities each share was subject to; and a regular deduction of the title to the share from its origin; whether in fact the Defendant could not require, as he insisted, the ordinary title which would be proper on the sale of a share of an estate, combined with an interest in a partnership.

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v.
FLIGHT.*Argument.**April 17th.*

Reference of title, upon motion by the Plaintiff (the vendor) after answer, notwithstanding the question in dispute in the cause might have been conveniently determined by the Court, at the hearing, without a reference.

Judgment.

Whether the question in a cause be, what evidence of title the vendor is bound to give; or whether he is able to give sufficient evidence,—the question is equally one of title, and the proper subject of a reference.

The Plaintiff moved for a reference of the title.

Mr. *Wood* and Mr. *Bacon*, for the motion.—The contract is admitted by the answer, and the Defendant has not set up the Statute of Frauds, or any other objection, as a bar to the right of the Plaintiff to enforce it.

Mr. *Romilly* and Mr. *Rogers*, for the Defendant, said, the question between the parties was not purely a question of title. It was a question as to the principle upon which the title was to be investigated. It was a case in which the Plaintiff might and ought to have set down the cause upon bill and answer, so that the Court might have disposed of the point at the hearing without the further expense and delay of a reference. They referred to 2 Sugden, Vendors and Purchasers, pp. 35, 36, 10th ed.

The VICE-CHANCELLOR said, it was perhaps a case which might have been conveniently disposed of at the hearing. He could not understand the distinction attempted to be made in the present case, between a question of title and a question of the principle upon which a title should be inquired into. It was incumbent upon the Plaintiff to shew, either in one way or another, that he had power to give the Defendant that which he had contracted to sell to him. The question was, therefore, in fact, a question of title; and the Plaintiff was entitled to the reference which he asked by his motion. The Master would inquire whether the Plaintiff could make a good title to the shares mentioned in the pleadings; and, if he could, when such title was first shewn.

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GREEN v. PERTWEE.

2nd & 6th
July.

THE testator in the cause, by his will, dated in 1839, devised his real estate to the executors and trustees of his will, upon trust for sale, and directed that the net monies to arise from such sale or sales, (after deducting the expenses attending the same), together with the rents and profits of the premises until the sale, should become and be taken and deemed to be part of his personal estate, and be applied as thereafter mentioned; and bequeathed the whole of his personal estate to his executors therein named, upon trust to call in and convert the same into money, and stand possessed of the whole of such personal estate when converted, and of the net proceeds of the said real estate, and the rents and profits, after and subject to the payment of all his debts, funeral and testamentary expenses, the legacies given by his will, and which he might thereafter give by any codicil, the charges of proving his will, and all charges incident to the executorship thereof, upon trust, in the first place, to divide the same into ten equal parts or shares, and to stand possessed of the said parts or shares, upon trust for the several persons therein named. And the testator declared his will to be, that, in case the net residue of his property, after paying all his debts, legacies, and testamentary and other charges and expenses, should be found to exceed the sum of 10,000*l.*, then the sum of 10,000*l.* only thereof should be applicable to the trusts thereinbefore declared, and that each share should be satisfied by the payment of 1000*l.* And in that case the testator bequeathed all the residue of his said pro-

The testator gave his real and personal estate to his executors, upon trust, after conversion and payment thereof of his debts, funeral and testamentary expenses and legacies, to stand possessed of the residue, and divide the same into ten equal parts or shares, which he bequeathed to ten persons named in his will, and he declared that if the net residue of his property, after payment of the debts, &c., should exceed 10,000*l.* then 10,000*l.* only should be applicable to the said trusts (1000*l.* to each share); and in that case the testator gave the residue of his said property beyond the sum of 10,000*l.* to his nephews and nieces in equal shares. The net residue after the payment of debts, &c., exceeded

10,000*l.* One of the tenth shares of the 10,000*l.* lapsed by the death, in the testator's lifetime, of one of the ten legatees:—*Held*, that the lapsed share of 1000*l.* did not pass as residue to the nephews and nieces, but was undisposed of.

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perty beyond the said sum of 10,000*l.* unto, and to be equally divided between and amongst, all and every his nephews and nieces who should live to attain the age of twenty-one years, share and share alike.

The residue of the real and personal estate of the testator, after payment of his debts, legacies, and the other expenses, exceeded the sum of 10,000*l.* One of the shares of 1000*l.* lapsed by the death of a legatee of one of the ten shares in the lifetime of the testator.

The question was, whether the lapsed share of 1000*l.* belonged to the nephews and nieces in their character of residuary legatees, or whether it was undisposed of, and belonged to the next of kin. The question was raised upon demurrer to the bill of the nephews and nieces of the testator.

Argument.

Mr. Romilly and Mr. Hallett, for the testator's nephews and nieces.—The lapsed share passes by the bequest of residue. *Bland v. Lamb* (a), *Easum v. Appleford* (b). This has always been the principle with reference to personal estate, (*Leake v. Robinson* (c)), and it is now, under the Statute of Wills (d), the rule not only as to personal estate, but also as to that part of the lapsed share which arose from the real estate.

Mr. Anderdon, Mr. Wood, Mr. Bacon, and Mr. Walpole, for the heir-at-law of the testator, who was one of his next of kin, and also for the other next of kin.—The gift to the nephews and nieces is a gift only of the excess of the residue, beyond the 10,000*l.* No part of the 10,000*l.*

(a) 2 J. & W. 402.

(c) 2 Mer. 392.

(b) 5 My. & C. 56; *S. C.*,
 10 Sim. 274.

(d) 7 W. 4 & 1 Vict. c. 26,
 s. 25.

is given to them. A part of that sum, having lapsed, creates to that extent an intestacy. The lapsed sum of 1000*l.* is a part of the residue apportioned by the testator amongst several legatees, and in such a case, where the gift of a portion of the residue fails, the portion so given does not pass to the other residuary legatees, but is treated as undisposed of: *Attorney-General v. Johnstone (a)*, *Lloyd v. Lloyd (b)*, *Skrymsher v. Northcote (c)*. Being undisposed of, the heir-at-law is entitled to that part which arose from real estate, and the next of kin to the personal. The cases of *Harris v. Davis (d)* and *Davers v. Dewes (e)* were also cited.

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The decision of the Court upon the demurrer cannot determine the question as between the defendants, the heir-at-law and next of kin; that question must be settled in some other manner.

VICE-CHANCELLOR, after stating the words of the will:—

July 6th.
Judgment.

The share in the sum of 10,000*l.*, which has become lapsed by the death of the legatee in the life-time of the testator, will be undisposed of, unless it passes under the residuary clause of the will; and the question is—whether the word “residue,” as used in the latter part of the second clause, must be understood as describing the general residue of the testator’s estate, or only the excess of the estate over the sum of 10,000*l.* The word “residue,” in its large and general sense, comprehends whatever in the events which happen turns out to be undisposed of; but if it appears that the word “residue” is used in a more restricted sense, in that

(a) *Ambl.* 577.

(d) 1 *Coll. C. C.* 416.

(b) 4 *Beav.* 231.

(e) 3 *P. Wms.* 40.

(c) 1 *Swans.* 568.

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restricted sense the Court is bound to construe it. Now, if in this case the question depended upon this, whether the testator intended his nephews and nieces to take his personal estate, except such parts as he had effectually disposed of by his will, the answer to that question must be in the negative. If the trust estate, after paying the debts and legacies, had been one shilling less than 10,000*l.*, the nephews and nieces would have taken nothing, although the legatees had all died in the lifetime of the testator. And if that be admitted, it is difficult to believe that the testator could have intended by the second clause not merely that the nephews and nieces should take any excess, but that, with the excess, they should take also what was not given them unless that excess existed.

It is not however by speculation that the case must be decided. The word "residue," as used in the beginning of the will, clearly means general residue. Of that there can be no doubt. When therefore the testator, in the concluding part of the clause, gives 10,000*l.* out of that residue to the ten legatees, and declares that the residue shall go to his nephews and nieces, it is of necessity that the word "residue" in that place means not the general residue in its extended sense, but the excess of the general residue over and above the 10,000*l.* and nothing more. This construction is supported, I think, by the cases of *Skrymsher v. Northcote* (a), *Lloyd v. Lloyd* (b), *Page v. Leapingwell* (c), and the other cases cited.

Let the costs be paid out of the general estate of the testator; for a different construction might have been put upon the will without violence to the language.

(a) 1 Swans. 566. (b) 4 Beav. 231. (c) 18 Ves. 463.

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COX v. BARNARD.

20th & 21st
April.

THE bill was filed to establish the will of the testator, *John Lyde*, and for the execution of the trusts thereof, under the direction of the Court. The bill also prayed an account of the real estates of the testator, distinguishing the estates devised in trust for the Plaintiff, and those devised in trust for the Defendants, *John Malyn*, *Elizabeth*, his wife, and their children; and in case the personal estate should be insufficient to pay the debts and funeral and testamentary expenses, that the deficiency might be apportioned between the estates devised as aforesaid.

In a suit to execute the trusts of a will devising real estates to trustees for certain persons for life, and after their decease, for sale; with power to give discharges for the proceeds and the rents and profits, and with a direction to stand possessed of the monies to arise thereby, upon trust for the children of the tenants for life, the trustees and the tenants for life being Defendants—but there being no power of sale until after the death of the tenants for life, the Court, notwithstanding the 30th Order of August, 1841, directed that the children of the tenants for life should be made parties.

Statement.

The testator, by his will and codicils, made in the years 1842 and 1843, devised certain estates at *Deptford*, in the county of *Kent*, unto and to the use of *John Barnard* and *Elizabeth Porter*, their heirs and assigns, upon trust from time to time to pay the rents and profits of the said hereditaments unto *John Malyn* and his assigns for his life, and from and after his decease to pay the said rents and profits unto *Elizabeth* the wife of the said *John Malyn*, in case she should be then living, during her life, for her separate use, and so that she should have no power to charge or incumber such rents and profits or the accruing payments thereof. The devise then proceeded:—"And immediately after the decease of the survivor of them, the said *John Malyn* and *Elizabeth* his wife do and shall stand seised and possessed of the said hereditaments and premises, upon trust, that they the said *John Barnard* and *Elizabeth Porter*, or the survivor of them, his or her heirs or assigns, do and shall absolutely sell the said hereditaments and premises, either together or in separate parcels, and either by public auction

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or private contract, and convey and assure the same unto the purchaser or purchasers thereof, as he, she, or they shall direct, and receive the monies arising from the sale or sales thereof, and give effectual discharges for the same, exonerating the purchaser or purchasers from all liability in respect of the application thereof. And I direct that until such sale or sales the rents and profits of the said hereditaments, or of such part thereof as shall from time to time remain unsold, shall be paid unto the person or persons who, under the trusts hereinafter contained, would be entitled to the income and proceeds of the monies arising therefrom; and I hereby direct and declare that the said *John Barnard* and *Elizabeth Porter*, and the survivor of them, his or her executors or administrators, shall stand possessed of the monies to arise from the aforesaid sale, and the rents and profits in the meantime, in trust for such child or children of the said *John Malyn* and *Elizabeth* his wife, as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, equally to be divided between them if more than one."

The testator also gave his trustees a power of leasing the premises during the lives of the tenants for life, and of the survivor of them, for any time not exceeding seven years, at a rack rent.

At the hearing of the cause, a preliminary objection was taken, that the children of the Defendants, *John Malyn* and *Elizabeth* his wife, were necessary parties to the suit, and were not before the Court.

Argument.

Mr. *Romilly* and Mr. *Hubback*, for the Plaintiff, submitted, that, under the Order XXX of August, 1841, the children of Mr. and Mrs. *Malyn* were not necessary

parties. The parents who took the preceding life estates under the will were before the Court, because, in their lifetime, the trustees had no powers of sale: upon the death of the tenants for life, the trusts for sale would take effect, and the trustees were then empowered to sell the estate, and give discharges for the proceeds, and for the rents and profits. The trustees, therefore, represented the children of Mr. and Mrs. *Malyn*, the parties beneficially entitled in remainder, within the meaning of the order, so as to dispense with the necessity of making them parties to the suit.

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Mr. *Kenyon Parker*, Mr. *Wood*, Mr. *Schomberg*, Mr. *Haldane*, Mr. *Cankrien*, and Mr. *Anstey*, for the several other parties.

VICE-CHANCELLOR:—

I entertain some doubt whether this case is within the terms of the 30th Order. That Order was intended to apply to real estate the principle which was applied in the case of personalty. The executor represented the entire personal estate, and the parties beneficially interested were never made parties. Under this rule personal property to any extent was administered by the Court. With regard to real estate it was otherwise. Notwithstanding the trustees might have the most unlimited powers of dealing with the estate, the parties beneficially interested, however small or remote their interest might be, were still held to be necessary parties. The order was designed (as far as it goes) to give the same representative character to devisees in trust of real estate, which the principles of the Court gave to executors, in cases where the powers of the devisees were equivalent to the powers of executors. The order is, "that, in all suits concerning real estate

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which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate." I believe the Lord Chancellor of Ireland has made a general order applicable to suits in that country, which extends the representation by trustees of real estate much farther. It has, however, been thought proper to limit the order in question, until the safety of the principle shall have been proved by its operation in practice. In this case the devisees in trust have no present power to sell: the power of sale does not come into operation during the lifetime of the tenants for life. The trustees have not, therefore, that dominion over the estate which executors have at law over the personal property of a testator. The order refers to the possession of analogous powers in the two cases;—to powers which the executors actually have at the time the Court is called upon to administer the estate, and not to powers which they will have at a future time, or after a certain event shall have happened. I think, therefore, that this is a case in which, even if the circumstances bring it within the language of the order, I ought to exercise the discretion given to the Court in the latter part of the order, and direct that the persons interested in remainder be made parties to the suit.

1846.

THE GOVERNORS OF CHRIST'S HOSPITAL
v. ATTORNEY-GENERAL.

May 2nd.

THE Plaintiffs were the trustees of funds which had been bequeathed to them from time to time for the liberation of prisoners, for debts under 40s. The operation of the recent statutes relating to imprisonment for debt having deprived the charity of its objects, the Plaintiffs filed their bill to obtain the direction of the Court for the future administration of the trust funds, making the Attorney-General the Defendant.

The proper form of suit to administer the funds of a charity is the information of the Attorney-General; but the trustees may file a bill against the Attorney-General to have the accounts of the charity taken, and to be personally discharged from liability in respect thereof, submitting to such account as the Attorney-General would be entitled to ask against them in an information; and in the same suit, if the Attorney-General desires it, the Court will direct a reference for a scheme.

Mr. *White*, for the Bill.

Mr. *Wray*, for the Attorney-General, said that the course taken by the Plaintiffs was novel. The proper course would have been for the trustees to have brought the case before the Attorney-General, that the suit might have been framed in the common way, by information,—the Attorney-General being informant, and the trustees, who were the accounting parties, the Defendants.

Judgment.

VICE-CHANCELLOR :—

The proper and formal shape of a suit for determining the mode in which the funds belonging to a charity should be administered is by the information of the Attorney-General. I do not, however, see why the trustees of property applicable to charitable purposes may not, like any other trustees, come to this Court to have the accounts of the trusts taken, and to be discharged from personal liability. But the trustees, although they are Plaintiffs, must in such a case

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submit to account in the same manner, and to the same extent, as the Attorney-General might have required if they had been Defendants. I will refer it to the Master to settle a scheme for the future disposition of the funds of the charity, if the Counsel for the Attorney-General asks for that direction, or does not object to its being made in this suit.

19th & 25th
 February.

HARBIDGE v. WOGAN.

25th March.

In a marriage settlement the property of the wife was conveyed and assigned in trust for the wife for life for her separate use, remainder to the husband for his life, remainder to the children of the marriage, and in default of issue of the marriage, to the brother of the wife and his children. After the marriage the husband and wife filed their bill,

BY an indenture of settlement, dated the 7th of July, 1841, between the Plaintiff *Letitia Harbidge* (then *Letitia Wogan*) of the first part, the Plaintiff *William Harbidge* of the second part, the Defendant *William Wogan* and *T. E. Lander* of the third part, and the Defendants *William Wogan* and *J. Fletcher* of the fourth part, reciting that the Plaintiff *Letitia* was seised in fee-simple of certain freehold property at *Shiffnall*, in the county of *Salop*, and was entitled to a sum of 1100*l.*, invested on a mortgage security; and that a marriage had been agreed upon between the Plaintiffs; and that, upon the treaty for such intended marriage, it was agreed between the parties that the said freehold property, and the said sum of 1100*l.*, should be conveyed

charging that the brother, who was one of the trustees of the settlement, in concert with the solicitor's clerk, who took the instructions for, and attended the execution of the settlement, had fraudulently omitted or erased from the deed a general power of appointment by the wife, in default of issue of the marriage, and praying that the settlement might be rectified by inserting such a power. The wife did not prove the instructions for the insertion of such a power, nor the fraud in omitting or erasing it, but it appeared by the evidence that the power had been introduced in the draft settlement prepared by counsel, and also in the engrossment; and the answer of the brother stated, that, the power having been noticed by him when the engrossment was read over to him, he objected to it, as not being according to his understanding of the intentions of the wife, when the solicitor's clerk admitted it was not, and struck it out. The Court held, that it was the duty of the brother, as one of the trustees, not to have permitted the power to be struck out without the express directions of the intended wife on that point; and that relief might be given in the suit, subject to the question whether the wife knew, when she executed the settlement, that it did not contain the power.

and assigned to the Defendants *William Wogan* and *J. Fletcher*, their heirs, executors, &c., upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, declarations, and agreements thereafter expressed and declared; the Plaintiff *Letitia* granted and released, and assigned and transferred, unto the Defendants *William Wogan* and *J. Fletcher*, their heirs, executors, &c., the said freehold hereditaments, and the said sum of 1100*l.*, and the interest to become due thereon in trust for the Plaintiff *Letitia* and her assigns, until the marriage; and after the solemnization thereof, upon trust for the separate use of the Plaintiff *Letitia*, independent of the Plaintiff *William Harbidge*, or any future husband, but without any restraint upon anticipation; and from and after the decease of the Plaintiff *Letitia*, upon trust for the Plaintiff *William Harbidge* and his assigns for his life, and immediately after the decease of the survivor of the said Plaintiffs, then upon trust for the children of the marriage, as therein mentioned; and if none of such children should attain vested interests as therein mentioned, then upon trust for the Defendant *William Wogan* and his assigns for his life, remainder in trust for his children as tenants in common; and in case none of such children should attain vested interests as therein mentioned, then in trust for the Defendant *William Wogan*, his heirs, executors, and administrators for ever. And the indenture contained provisions for the maintenance and advancement of the children of the marriage, for the sale of the trust premises by the trustees, with the consent of the Plaintiffs, or of the survivor of them, for the investment of the trust monies, and change of the securities at the discretion of the trustees, upon the request of the Plaintiffs, or the survivor of them, and for the appointment of new trustees: it also contained provisions that the receipts of the trustees should be good dis-

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charges for the trust funds, and for the indemnity of the trustees.

The marriage of the said Plaintiffs took place soon after the date of the settlement.

The bill was filed in March, 1842, by *Letitia Harbidge* (by her next friend), and *William Harbidge*, against the Defendant *William Wogan*, and *J. Fletcher*, the trustees of the settlement; the children of *William Wogan*, the parties to whom the property was limited in remainder; and *John Bulger*, who, as the clerk of Mr. *Robinson*, a solicitor at *Wellington*, managed the business of the latter at *Shiffnal*, and had been employed in the preparation of the deed of settlement. The bill alleged, that, upon the treaty for the marriage, it had been expressly stipulated and agreed by and between the Plaintiffs, that the property of the Plaintiff *Letitia* should be settled upon and for the benefit of the Plaintiffs and the children of the marriage, if any; and, in default of any children who should attain vested interests, that the Plaintiff *Letitia* should have a general absolute power of appointment and disposition of the said property by deed or will, subject to the interests to be limited to the Plaintiffs and the children of the marriage, and, in default of such appointment, for the benefit of the Defendant *William Wogan* and his children; that the Plaintiff instructed *Bulger* to prepare the settlement, and gave him express instructions to insert in it such power of appointment by her; and such power was accordingly inserted in the draft, and in the original engrossment of the settlement from the draft; but that the power was afterwards struck out of the engrossment by the contrivance and fraud of the Defendant *William Wogan*, and the said *John Bulger*, without the consent of the Plaintiffs. The bill alleged that the settlement was exe-

cuted by the Plaintiff *Letitia* without being read over to her, and without any intimation that the power of appointment had been struck out or omitted; and that it was not until some time after the marriage, when they applied to *Bulger* for and obtained a copy of the settlement, that they became aware that it did not contain such power of appointment.

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The bill prayed that the erasure or omission of the power of appointment by the Plaintiff *Letitia* from the settlement might be declared fraudulent as against the Plaintiffs; and that it might be declared that the Plaintiff *Letitia* is entitled (subject to the trusts in favour of the Plaintiffs and their children) to appoint and dispose of the property and funds comprised in the settlement as she might think proper, in priority to the trusts in favour of the Defendant *William Wogan* and his children; and that, if necessary or proper, a new deed of settlement might be decreed to be executed by all proper parties for effecting the purposes aforesaid; that a new trustee might be appointed instead of the Defendant *William Wogan*; for a receiver; and that the Defendants *William Wogan* and *John Bulger* might be decreed to pay the costs of the suit.

The Defendant *William Wogan*, by his answer, said that the Plaintiff *Letitia* was his sister, and they had no other near relation except their mother; and that the Plaintiff, before her marriage, had, of her own accord, stated to the Defendant her intention to settle her property upon the Defendant and his children after the death of herself and her then intended husband; and that she did not express any intention of reserving to herself a general power of disposition; that the Plaintiff *William Harbidge* was a farmer's bailiff, in indigent circumstances, and the Defendant was very averse to the

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marriage, and feared that the Plaintiff would dissipate his wife's property if he could influence her to give him power over it. The answer stated, that, having reluctantly consented to be a trustee of the settlement, he called on *John Bulger*, at his request, at the office of *Mr. Robinson*, in *Shiffnal*, in July, 1841, to execute the deed; that *Bulger* then read over the engrossment, and the Defendant, perceiving that it contained a general and absolute power to the Plaintiff *Letitia* of appointment and disposition over the property, subject to the life interests of herself and her intended husband, and the interests of her children if she should have any, told *Bulger* that the settlement in that respect was not according to the statement which had been before made to him of its intended contents, and that he (the Defendant) considered the settlement would in that shape be useless, as it would be no security to his sister against the solicitations of her intended husband; that *Bulger* immediately said it was true that the settlement with respect to the said power was not according to the instructions which he had received, and that the power had been introduced by a mistake of *Mr. Robinson*; and *Bulger* thereupon, immediately and of his own accord, and not at the instance in any way of the Defendant, struck out with his pen the power from the engrossment, stating to the Defendant that he would explain the obliteration to the Plaintiffs, and that he was certain it would be agreeable and satisfactory to them. The Defendant said, that he desired *Bulger* to be very particular in explaining to both the Plaintiffs the effect of the alteration previous to their execution of the settlement, which he promised; and the Defendant thereupon, in the full conviction that the settlement, as altered, was in full accordance with the intentions of the Plaintiffs, executed the same, and accompanied *Bulger* to the house of his mother, where the Plaintiff *Letitia*

then resided, and where she then (though not in the Defendant's presence) executed the deed. The Defendant denied that it was ever stipulated or agreed by the Plaintiffs, that the Plaintiff *Letitia* should have such power of appointment as the bill alleged; and he denied that the Plaintiffs had executed the same without having received any intimation that the power of appointment was struck out, but, on the contrary, the Defendant said he believed they executed the same with full knowledge that it contained no such power; and he wholly denied the fraud imputed to him by the bill.

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The Defendant *Fletcher*, the other trustee, had no personal knowledge on the subject, and submitted to act as the Court should direct. The children of the Defendant *Wogan* were infants, and submitted their rights and interests to the protection of the Court. The Defendant *Bulger* died after the suit was instituted, and before he had put in any answer to the bill.

The Plaintiffs went into evidence in support of the bill. *Ann Franks*, who had been a servant of the Plaintiff *Letitia's* mother for several years before and at the time of the marriage, deposed, that she had frequently heard the Plaintiffs, before their marriage, talking of having the property settled; and that she heard the Plaintiff *Letitia* say she should wish to have the deed made so that she should have the property for her life, and that then it should go to her husband for his life, and that, after that, she should have a power of willing it away to whom she pleased, as she might wish to leave it to her brother and his children; that she heard the Plaintiff express herself to the same effect to *Bulger*, in a conversation respecting the settlement before the marriage; that the Plaintiff was then nearly fifty years of age; that the witness heard what passed on the execu-

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tion of the deed by the Plaintiff *Letitia*, and that no explanation of the deed was then given by *Bulger*, but that he only pointed out where the Plaintiff was to sign her name.

Mr. *Robinson* was examined on the part of the Defendant *William Wogan*, and deposed that *Bulger* had been the managing clerk of his business at *Shiffnal*; that *Bulger* had prepared a draft of the marriage settlement of the Plaintiffs, and delivered it to him (Mr. *Robinson*), and requested him to draw another draft therefrom, treating the first draft as instructions; that such draft was the only information he (Mr. *Robinson*) received of the intentions of the Plaintiffs; that the draft he so received from *Bulger* did not contain the power of disposition by the Plaintiff *Letitia*, subject to the interest of the husband and wife, and children of the marriage; that he did not settle the draft he so received, but sent instructions to counsel to prepare another draft, and in such instructions directed that the draft should contain a power to enable the Plaintiff *Letitia* to dispose of the trust property to any person she pleased; that he had no authority for so doing, and was not instructed by the Plaintiffs or *Bulger*, or any other person, to have such power inserted; but he directed the same to be inserted of his own accord, fancying it might be an oversight on the part of *Bulger*, and finding several other usual clauses were omitted, which he thought ought to have been inserted; that he referred, in giving such instructions, only to the possibility of the Plaintiff marrying again, and to enable her to provide for a second family; that the draft was prepared by counsel from such instructions, and that the settlement was engrossed from the draft so prepared by counsel; that *Bulger* afterwards told the witness that the power of appointment ought not to have been inserted in the instructions, as

the Plaintiff *Letitia* was an elderly person, and there was no necessity for the precaution; and the witness thereupon directed *Bulger* to strike it out of the draft, when the same was returned from counsel. Several other witnesses also deposed to language and declarations by the Plaintiff *Letitia*, to the effect that the settlement was framed in conformity with her desire and instructions.

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 Statement.

Mr. *Romilly* and Mr. *Rogers*, for the Plaintiffs.—The evidence, if it does not establish a case of fraud against the Defendant *Wogan*, and the deceased Defendant *Bulger*, at least establishes the fact that the settlement has not been framed in accordance with the intentions of the Plaintiffs, or with the instructions which were given for its preparation. This is sufficient to entitle the Plaintiffs to the relief which is prayed by the suit, so far as it extends to the rectification of the settlement, by the introduction of the power of appointment. They cited *Beaumont v. Bramley* (a), *The Duke of Bedford v. The Marquis of Abercorn* (b), *Pearce v. Verbeke* (c), and *The Marquis of Breadalbane v. The Marquis of Chandos* (d). It must not be forgotten that, by the death of *Bulger*, the Plaintiffs had lost the benefit of discovery from him.

Argument.

Mr. *Tinney* and Mr. *G. L. Russell*, for the Defendant *William Wogan* and his children.—The case made by the bill is not a case of mistake, but of fraud. If the Plaintiffs fail in establishing the fraud, they fail in the suit. Even supposing that the suit had been framed for relief on the ground of mistake, it must still fail; for, so far from any mistake having been proved, the

(a) T. & R. 41.

(b) 1 Myl. & Cr. 312.

(c) 2 Beav. 333.

(d) 2 Myl. & Cr. 711.

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best evidence of which such a case admitted had been given, that the settlement, as it stood, was in perfect conformity with the intentions of the plaintiff Mrs. Harbidge, as those intentions had been always expressed before the marriage.

Mr. *Kenyon Parker*, Mr. *Faber*, and Mr. *Rudall*, for the other Defendants.

VICE-CHANCELLOR:—

Feb. 25th.
—
Judgment.

At the time of the marriage of the Plaintiff *William Harbidge* with the other Plaintiff, *Letitia* his wife, *Letitia* was entitled to personal property amounting to about 1000*l.*, and to a small freehold estate; and, upon the occasion of the marriage, it was agreed that the property of *Letitia* should be the subject of settlement; and a settlement was accordingly made. By the terms of this settlement the property stands limited to the separate use of *Letitia* for life, with remainder to her husband for life, with remainder to the children of the marriage; and, in default of children, the property stands limited to the Defendant *William Wogan* (the brother of *Letitia*, and one of the trustees of the settlement) for his life, with remainder to his children. The settlement contains no limitation or power enabling Mrs. Harbidge, in the event of there being no children of the marriage, to dispose of the property, so as to defeat the ultimate limitation to *William Wogan* and his children. There are at present no children of the marriage; but according to the terms of the settlement, subject to the interests of any children who may be born, the property will vest absolutely in *William Wogan* and his children. The bill insists that the settlement ought to have contained a power enabling Mrs. Harbidge to dispose of the property in the event of there being no children of the

marriage; and it insists that the settlement, as engrossed, did contain such a power, but that it was afterwards struck out by a fraudulent contrivance to which *William Wogan* was a party; and the suit, in fact, seeks to have it declared that *William Wogan* and his children are to be treated as trustees for *Mrs. Harbidge*, so far as to give her a power over the property; or, in other words, to have that power inserted in the settlement.

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I was of opinion, and stated at the hearing of the cause, that there did not appear to me anything in the mere terms of the settlement itself, in the absence of fraud, which could enable the Court to give the relief prayed; although it might be unreasonable, as well as unusual, that the power should be omitted. I was also of opinion, that, on the ground of mistake merely, the Court could not give the relief. The answer states that the power, after having been deliberately inserted in the settlement, has been struck out; and the case, therefore, if it rests upon anything, can only rest upon fraud. But, though the terms of the settlement, standing alone, would not be ground for impeaching the form of the settlement as it stands, it is impossible to deny that these terms may be a material circumstance to be considered, taken in connexion with the other circumstances of the case.

Now, in order to try this case, I will suppose what I believe to be according to the fact, that the instructions given by *Mrs. Harbidge* to *Bulger* were in substance the same as those expressed in the articles as they now stand: that is, to settle the property upon herself for her separate use for life, with remainder to her husband for life, with remainder to her children, and, if no children, then to *William Wogan* for life, with remainder to his children. The first question in that case would be,

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whether, if these instructions had been laid before a conveyancer of competent skill, they are such as he would have strictly acted upon, without further question or observation. In my opinion, which is confirmed by inquiries which I have made of persons of very great experience, a conveyancing counsel would have prepared the settlement, and have given the lady a power over the property, subject to the interest of her children, if any, or at least he would not have prepared the settlement without either inserting, or noticing the propriety of inserting, such a power; and the Court, if called upon to execute such articles, by directing a settlement in conformity therewith, would, in the first instance, have directed such a power to be inserted, or would have put it to Mrs. *Harbidge* expressly to determine whether she desired that power to be excluded.

The next consideration is, the way in which this case was actually dealt with by those who framed the settlement, and by the parties to it. *Bulger*, who was not himself a solicitor, received, as the clerk of Mr. *Robinson*, the instructions from the Plaintiff *Letitia*, and prepared a draft settlement literally in accordance with these instructions, not containing the power in question, and forwarded to his principal the draft he had so prepared. Mr. *Robinson* did not himself prepare the draft settlement; but, converting the information he had received from *Bulger* into instructions, he forwarded such instructions to his counsel at *Shrewsbury*, and in those instructions he inserted the very power which the Plaintiffs say ought to have been inserted in the settlement: at the same time he noted in the margin of the instructions, that he had inserted the power with reference to the possibility of the lady marrying a second time, and having children of a second marriage. In that point of view the instructions were not, perhaps, well

considered ; for, if there had been one child of that marriage, that child would have taken to the exclusion of any children by a second marriage. However, these instructions, with whatever view prepared, went before counsel, who prepared the draft accordingly, and inserted in the draft the power which the Plaintiffs say ought to be contained in the settlement. In the interval between the time that Mr. *Robinson* sent his instructions to counsel, and the time the draft was returned, an interview took place, according to Mr. *Robinson's* evidence, between him and *Bulger*, when *Bulger* told him that no such power ought to be inserted in the settlement, that Mrs. *Harbidge* was fifty years old, and, there being no prospect of children of the intended marriage, the property was to be settled absolutely upon *William Wogan* and his children. Upon Mr. *Robinson* receiving this information, he told *Bulger*, if that were the case, he had better strike the power out of the draft. Upon the return of the draft from counsel, it is received by *Bulger*, who forthwith causes it to be engrossed, but without striking out the power. On the 6th of July, 1841, *William Wogan*, being then on a visit to Mrs. *Harbidge*, goes to *Shiffnal*, where *Bulger* lived, and waits upon him for the purpose of executing the settlement. *Bulger* then reads over the settlement to *William Wogan*, who immediately takes notice of the existence of this power. I have looked through *William Wogan's* answer ; I cannot see that it is alleged that Mrs. *Harbidge* ever told him that she meant to settle her property upon him absolutely, and in a manner which would leave her no control over it. I cannot, from anything that is there stated by him, make out that she ever affirmatively said, "deprive me of the power of dealing with this property." She is merely made to say, "I don't wish to have any more trouble about the property." And the statement is, that, upon the power being

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noticed by *William Wogan, Bulger* said that it was not intended to have such a power introduced, and immediately struck it out of the settlement; and in this state the settlement was executed by the Defendant *Wogan*, by *Fletcher* the other trustee, and by the husband and wife.

With regard to the husband there is evidence, which I should not be dissatisfied with, that he read the settlement, and must have known that the clause in question was struck out, and that he deliberately executed it with the knowledge of that fact. The husband has no legal interest in the insertion of the power; and he is not a Plaintiff in this Court in respect of the power, but only upon the ground that a fraud has been committed, and so far as the bill seeks to have new trustees appointed. I cannot, however, find any satisfactory evidence that the attention of Mrs. *Harbidge* was ever called to the fact that this settlement did not contain the power in question, or that she intended it should not be included. If instructions, in exact accordance with the instructions said to have been given by her, had been sent to counsel, such instructions would have led to the insertion of the power in the settlement, or to her attention being called to the question, whether she intended that it should be excluded. In this state of things, I think that the Defendant *William Wogan* is in a position which prevents him from saying that Mrs. *Harbidge* is bound by that which has taken place. I think his position, as one who had accepted the office of trustee, made it his duty to say to *Bulger*, "the power must not be struck out until the directions of my sister can be taken with respect to it." The question to be tried is, whether Mrs. *Harbidge*, before the execution of the settlement, knew that the settlement did not contain the power. I should wish the parties to

consider whether, in the circumstances of the case, the question can be more conveniently tried by a reference or an issue.

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The Defendants, *William Wogan* and his Children, moved that they might, by their counsel, be allowed to re-argue the case, on the point whether the Court would direct any issue or inquiry, upon the ground that under the actual circumstances it was the duty of the Defendant *William Wogan*, as intended trustee, not to let the settlement in question be executed by the Plaintiff *Letitia*, as altered, without previous notice being given to her of the fact of the alteration; or otherwise, that, upon the hearing of the motion, the terms of the issue or inquiry, to be directed by the decree, might be settled.

The VICE-CHANCELLOR directed an issue, whether the Plaintiff *Letitia*, when she executed the settlement made before her marriage with *William Harbidge*, knew that such settlement did not contain a power enabling her to dispose of the property therein comprised, after and in the event of the decease of herself and her then intended husband, and failure of issue of the then intended marriage? The Defendant *William Wogan* to be Plaintiff at law, and the next friend of the Plaintiff *Letitia* to be Defendant at law. Liberty for the Plaintiff at law to examine *Harbidge* and wife, and for the Defendant at law to examine *Wogan*, if they respectively should so think fit.

Minute.

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*6th, 7th, 22nd,
23rd, 25th, &
27th May.*

ALLEN v. KNIGHT.

THE Plaintiff, *William Woodgate Allen*, and the Defendants, *George Knight, Lewis Allen*, and *Charles Allen*, were in October, 1836, trustees under the will of one *Samuel Harris*, for the benefit of the family of the testator, of a sum of 1050*l.* New 3*¼* per Cents., which stood in their joint names as such trustees. *George Knight* and *Charles Allen* procured the stock to be lent to them upon the security of the title deeds or documents of title of a copyhold estate at *Twickenham*, of which they were tenants in common, accompanied by articles of agreement, dated the 24th of October, 1836, between *George Knight* and *Charles Allen*, of the one part, and the Plaintiff and *Lewis Allen*, of the other part, whereby *George Knight* and *Charles Allen* agreed to re-transfer the stock, when the same should become payable under the trusts of the will, and that the documents of title of the said copyhold estate should be deposited with *Lewis Allen* and the Plaintiff, and remain a security for the same and for the indemnity of the parties.

Four trustees sell out stock, under an agreement that the proceeds shall be lent to two of them, upon equitable mortgage, by deposit of the documents of title of a copyhold estate which belonged to such two trustees in undivided moieties. The money was lent, and the documents deposited; but afterwards, by some unexplained means, they came into the hands of one of the two trustees who had borrowed the fund, and that trustee made a second equitable mortgage on his own moiety of the estate, by depositing the documents with a third person, who took them without notice of the first mortgage; that trustee afterwards became bankrupt, and the second equitable mortgagee purchased and obtained from the assignees of the bankrupt a surrender, and was admitted tenant of the bankrupt's undivided moiety, having, at the time of such purchase of the legal estate, received constructive notice of the first mortgage.

In a suit by one of the trustees (the lender of the trust fund, the other having become bankrupt) for foreclosure, — *Held*, that the second equitable mortgagee, who had taken the legal estate with notice of the obligations of the mortgagor to third parties, could only hold that estate subject to such obligations, notwithstanding that he had originally taken his mortgage security without notice.

That, in the absence of any suggestion of a specific case, as against the plaintiff, charging him with acts whereby the mortgagor was enabled to commit the fraud, the mere fact of the possession of the title deeds by the mortgagor was not sufficient to postpone the claim of the first mortgagee.

That the fact of the loan of the proceeds of the stock having been a breach of trust, did not affect the question as between the first and second mortgagees.

That the cestui que trusts of the stock, not having been parties to or adopted the mortgage, were not necessary parties to the suit for foreclosure.

The deposit appeared to have been placed in the hands of *Lewis Allen*; but, by some means which were not explained, the title deeds came into the hands of *Charles Allen*; and *Charles Allen*, on the 5th of May, 1838, deposited the same deeds with *Margaret Jellas* and *Charles Faircloth*, in substitution for a previous security for two sums of 300*L.*, owing to them by *Charles Allen*, and by way of equitable mortgage of his undivided moiety of the estate. The second charge was taken by the second mortgagees without notice of the first. In June, 1838, *Charles Allen* became bankrupt, *Lewis Allen* also became bankrupt. The interests of the second mortgagees, *Jellas* and *Faircloth*, became vested in the Defendants *David* and *Elizabeth Smith*.

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The Defendants *David* and *Elizabeth Smith* purchased from the assignees of *Charles Allen* the equity of redemption of his undivided moiety in the estate, and in that transaction they had, through their solicitor, constructive, if not actual notice, of the first mortgage or charge of October, 1836, to the Plaintiff and *Lewis Allen*. On the 12th of August, 1844, the equity of redemption of the moiety of *Charles Allen* was conveyed and released by his assignees to the Defendants *David* and *Elizabeth Smith*; and on the 5th of November, 1844, the moiety of the tenements was surrendered, and the Defendants *David* and *Elizabeth Smith* were admitted tenants of the manor in respect of such undivided moiety.

The bill, which was filed against *George Knight*, *Lewis Allen*, and *David* and *Elizabeth Smith*, prayed that the sum necessary to replace the trust fund, might be declared to be a charge on both moieties of the estate, and that the Defendants might be decreed to execute to the Plaintiff a legal mortgage for the same. *Charles Allen*

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died before the institution of the suit. The cestui que trusts of the stock were made Defendants.

The answer of the Defendants *David* and *Elizabeth Smith* insisted upon their title to priority as mortgagees of their undivided moiety, on the ground that the fraud upon them could not have been effected but from the negligence of the Plaintiff in permitting the title deeds to come into the hands of *Charles Allen*; and they submitted that such negligence was a sufficient reason for postponing the Plaintiff's charge, as to that moiety, to that of the Defendants.

Argument.

Mr. *Wood* and Mr. *Rolt*, for the Plaintiff; and Mr. *Roundell Palmer*, for the Defendant *George Knight*, who was interested in supporting the case of the Plaintiff against the Defendants *David* and *Elizabeth Smith*, inasmuch as the effect of giving priority to the latter mortgage would be to throw the Plaintiff's charge entirely, or for the greater part, upon the moiety belonging to *George Knight*.

The Defendants the *Smiths* have, by their acquisition of the legal estate in the moiety of the copyhold premises, comprised in the mortgage to the Plaintiff and *Lewis Allen*, deprived themselves of any right which they may previously have had to hold the title deeds, as purchasers or mortgagees, without notice of the prior equitable mortgage. The Defendants' security has now become merged in or united with the equity of redemption; and whatever the anterior priorities may have been, the charge which the Plaintiff now seeks to enforce is the first incumbrance: *Toulmin v. Steere* (a), *Parry v.*

Wright(a), *Brown v. Stead(b)*, *Smith v. Phillips(c)*. The Defendants are now in the same position as the mortgagor whose estate they have purchased: *Saunders v. Dehew(d)*, *Beckett v. Cordley(e)*. They cannot exclude any incumbrance of which they have notice at the time they took the legal estate in the mortgaged property: *Greswold v. Marsham(f)*. The Defendants might have been deceived or defrauded by *Charles Allen*, when he induced them to accept the equitable mortgage of his interest in the property, concealing from them the existence of the prior charge; but that is not attributable to any act of the Plaintiff. No personal negligence or misconduct is imputed to the Plaintiff; and his security, therefore, cannot be affected by the deception which may have been practised upon the Defendants. The circumstance that the title deeds were not in his possession, and that they came into the possession of *Charles Allen*, is not an answer to the Plaintiff's claim, he being only one of two mortgagees in trust for others, and therefore not entitled to the sole possession of the documents: *Evans v. Bicknell(g)*, *Farrow v. Rees(h)*.

Mr. Romilly and Mr. Fisher, for the Defendants *David and Elizabeth Smith*.

The case of *Toulmin v. Steere* and the other cases of that class have no application to this case. This is not a case in which the charge has become merged in the legal estate: the Court does not treat the union of interests in the same party as a merger, unless it is intended to have that effect, or it is beneficial to the party

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- (a) 5 Russ. 142; S. C., 1
 Sim. & St. 369.
 (b) 5 Sim. 535.
 (c) 1 Keen, 694.
 (d) 2 Vern. 271.

- (e) 1 Bro. C. C. 353.
 (f) 2 Cha. Ca. 170.
 (g) 6 Ves. 173.
 (h) 4 Beav. 18.

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that it should be so treated: *Forbes v. Moffatt* (a), *Lord Selsey v. Lord Lake* (b), *Lord Compton v. Ozendon* (c). Supposing the equities of these parties to be otherwise equal, the Court will not, on the mere ground of priority in date, give effect to the Plaintiff's mortgage, by taking from the Defendant the benefit of the legal estate: *March v. Lee* (d), *Higgon v. Syddal* (e). In this case, moreover, the equities of the parties are not equal. The negligence of the mortgagees, who took the first charge in point of date, enabled the mortgagor to deceive the Defendants, by pretending to be the owner of the moiety of the estate free from incumbrance; and there is a long series of authorities which establish the proposition, that, when a party has been drawn in to purchase an estate, or take a security, which is the same thing, by the misconduct or misrepresentation of another, such other party is precluded from setting up a prior security or interest of his own: *Watts v. Creswell* (f), *Savage v. Foster* (g), *Ibbottson v. Rhodes* (h), *Draper v. Borlace* (i), *Berrisford v. Milward* (k). Nor is it necessary, in order to postpone the party so acting, that he should have designedly or fraudulently misled the other purchaser; it is sufficient that he did so in ignorance or by mistake: *Mocatta v. Murgatroyd* (l), *Pearson v. Morgan* (m), *Hobs v. Norton* (n), *Govett v. Richmond* (o). It is not material, as respects the Defendants, that the first mortgagees are trustees for other persons, nor that the Plaintiff may not be the party to be blamed for the negligence in permitting the mortgagor to have the documents.

(a) 18 Ves. 384.

(b) 1 Beav. 146.

(c) 2 Ves. jun. 264.

(d) 1 Cha. Ca. 162.

(e) 1 Cha. Ca. 149.

(f) 3 Eq. Ca. Ab. 515; S.

C., 9 Vin. Ab. 415, pl. 24.

(g) 9 Mod. 36.

(h) 2 Vern. 554.

(i) 2 Vern. 370.

(j) 2 Atk. 49.

(l) 1 P. Wms. 393.

(m) 2 Bro. C. C. 388.

(n) 1 Cha. Ca. 128.

(o) 7 Sim. 1.

Suppose his co-mortgagee, *Lewis Allen*, to have been the party in default, one must be regarded as the agent of the other, and, as between them and third persons, responsible for the acts of the other in their joint business. With regard to their character of trustees, either their acts are or are not within the scope of their trust: if within it, the loss, if any, must fall upon the trust fund; if their acts were (as they are, in fact, admitted to have been) a breach of trust, so far from being on that account entitled to the aid of the Court, it is a reason for refusing that aid, and leaving them to bear the consequences of their own conduct. If, however, the Court should be of opinion that it is material to ascertain—as between the Plaintiff and *Lewis Allen*, his co-trustee—which of them was the party to whose negligence it was owing that the documents constituting their only security were permitted to depart from their possession; that is a question as to which the Court will direct an inquiry.

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Mr. *Stinton*, for *Lewis Allen*.

Mr. *Hallett*, for the cestui que trusts under the will of *Harris*.

VICE-CHANCELLOR:—

Judgment.

The facts of this case are not in dispute. The original priority of the incumbrances of October, 1836, and May, 1838, was of course according to their several dates; and what the Court has to consider is, whether that priority has been disturbed. At the time when the second mortgage was made, no notice existed of the prior mortgage; but before the purchase was completed, in 1844, the second mortgagees had constructive notice of that prior mortgage.

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The first question is, whether the conveyance of the legal estate by means of the surrender, and the admittance thereunder, has altered the relative position of the parties. *Charles Allen*, at that time, filled different characters. He was trustee, under the will of *Harris*, of the 1050*l.* stock,—of the equitable mortgage for securing it,—and of the legal estate by which the equitable mortgage was protected. He was, in addition to his character of mortgagor, bound by express contract with two of the trustees of *Harris's* will. The question is, could the Defendants, the *Smiths*, either as purchasers for value or as second mortgagees, having notice of *Charles Allen's* obligations to his cestui que trusts, insist upon holding the legal estate as against those parties, with notice of whose rights that estate was taken? I think they could not; and that they must hold the legal estate precisely as *Charles Allen* held it; for which the case of *Saunders v. Deheu (a)* is an authority, if authority were wanting. My opinion therefore is, that the change of the legal estate made no difference in the position of the parties.

The second question is, whether the circumstance, that *Charles Allen* was allowed to have possession of the documents, and was thereby enabled to commit the fraud, entitles the Defendants, the *Smiths*, to have their mortgage preferred to that of the Plaintiff. It was argued for the *Smiths*, that the mortgage of October, 1836, was an improper investment of trust monies, and therefore was a breach of trust. This was admitted to have been the case; and it was said that that circumstance was favourable to the claim made on the part of the Defendants, the *Smiths*. I think the breach of trust makes no difference between the two mortgagees. The case must be looked at as if the Plaintiff had done that which he

(a) 2 Vern. 271.

was bound to do,—as if he had re-couped the trust estate the sum of 1050*l.* stock, which was improperly lent upon mortgage, and was now seeking his own indemnity, by means of the security upon which the trust fund was so lent. I cannot see how a party claiming as second mortgagee can improve his case by the circumstance, that the first mortgagees, as between them and other persons, had committed a breach of trust. The question, therefore, turns simply upon the possession of the documents of title by *Charles Allen*, apart from any consideration with reference to the breach of trust. It was said, that these documents had, in fact, been left in the possession of *Lewis Allen*; that *Lewis* was the Plaintiff's agent; and that *Lewis* had improperly allowed *Charles Allen* to have possession of the documents, by means of which the fraud was committed. Without relying upon the term "agent," I am not prepared to deny that the Plaintiff might be bound by the acts of *Lewis Allen*, but there is no evidence as to what those acts were, or by what means *Charles Allen* obtained possession of the documents; and, in the absence of information upon that point, the case of *Evans v. Bicknell*(a) is an authority that the mere possession of the title deeds by the mortgagors is not sufficient by itself to postpone the claims of the first equitable mortgagees. No case has been suggested in the answer of the Defendants, the *Smiths*, shewing that any specific blame can be imputed to the Plaintiff; and the only question is, whether I should direct an inquiry as between the Defendants, the *Smiths*, and *Lewis Allen*, on the principle that his acts are the acts of, and bind the Plaintiff. The question, whether the Court should direct an inquiry, is always matter of discretion. In this case, the argument for the *Smiths*, if taken strictly, proves too much. If their case be, that

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(a) 6 Ves. 173.

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the acts of *Lewis Allen* bind the Plaintiff, then their case ought to have been made upon the record against the Plaintiff. No such case has been made, nor is there any suggestion upon the record that any such case was supposed to exist. If the object of the inquiry be mere discovery, the discovery should have been sought before. I do not think I ought now to direct an inquiry to see what may possibly turn out to be the case, upon the mere supposition that it may appear that *Lewis Allen* did some act, by the effect of which Lord *Eldon's* observations in *Evans v. Bicknell* are rendered inapplicable to the transaction.

The only remaining question is that of costs. Unquestionably the Defendants, the *Smiths*, have suffered by the fraudulent act of *Charles Allen*, and he could not have committed the fraud if the Plaintiff and *Lewis Allen* had taken care that the deeds were in proper custody. I do not think, therefore, that it is a case in which the Plaintiff ought to have his costs of the suit. Then, with regard to the costs of the cestui que trusts, it is quite clear that they are not necessary parties. They were neither parties nor privy to the mortgage of October, 1836. It is admitted to have been a breach of trust, and there is no suggestion that they have ever adopted the transaction, and thereby discharged the trustees from their liability. The cestui que trusts might have passed by the mortgage altogether, and have called upon the trustees to replace the stock. The suit, therefore, must be considered as a suit by the Plaintiff for his own benefit. The strict course to have been pursued by the Plaintiff in such a case, would have been to re-coup the trust estate, and then to sue for the purpose of recovering what could be recovered upon the mortgage. Even if the cestui que trusts had adopted the transaction, the expense of additional parties might

have been avoided, by procuring the cestui que trusts to join as plaintiffs. The Plaintiff has no right, in a suit for his own benefit, to make the cestui que trusts defendants, and throw the additional costs thereby occasioned upon the second mortgagees. The bill must be dismissed with costs as against the cestui que trusts. I give no other costs, and, with that exception, make the ordinary decree of foreclosure in a suit by an equitable mortgagee having the first incumbrance.

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Judgment.

LISTER v. TURNER.

BY an indenture, dated the 16th June, 1841, the Defendant *William Slater*, who carried on business as a salt manufacturer, conveyed to *Daniel Antrobus*, his heirs and assigns, for a nominal consideration, several messuages and hereditaments described in a schedule to the deed, including certain freehold tenements in *Meadow-street* and *Brunswick-Road, Liverpool*, upon trust, at any time or times thereafter, with the consent therein mentioned, to sell and dispose of the same, and to stand possessed of the monies to arise thereby, and of the rents and profits in the meantime, upon the trusts declared thereof by an indenture bearing even date, made between the said *William Slater* and *Alice Mary* his wife of the one part, and the said *Daniel Antrobus* of the other part. By the indenture of even date referred to in the in-

the agreement that the mortgage to be executed should contain a power of sale, the Court, on a bill to set aside a prior voluntary conveyance by the mortgagor, as fraudulent and void, under the stat. 27 Eliz. c. 4, decreed, that, on default of payment, the mortgaged property should be sold.

Whether, after the bankruptcy or insolvency of a debtor, any creditor (other than the assignees) can, in ordinary cases, sustain a suit to set aside a conveyance made by the debtor prior to the bankruptcy or insolvency, on the ground that such conveyance is fraudulent, within the stat. 13 Eliz. c. 5; or whether it is necessary that any creditor seeking to set aside such fraudulent conveyance must previously recover judgment at law for his debt,—*quære*.

12th, 13th, &
 23rd March.

An equitable mortgage by deposit of title-deeds, with an agreement in writing by the party making the deposit, to execute a formal mortgage of the property to the mortgagee for the balance which might be due to him, constitutes the equitable mortgagee a purchaser for good consideration within the stat. 27 Eliz. c. 4, in respect of such balance; and, it being a term of

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denture of the 16th of June, 1841, the trusts of the said monies were declared to be, for the separate use of the said *Alice Mary* the wife, during the joint lives of herself and her said husband, *William Slater*, without power of anticipation; with remainder for the survivor of them; remainder for their children, as therein mentioned.

On 21st of July, 1841, the Defendant *William Slater* deposited with his bankers, the Union Bank of *Liverpool*, the title deeds relating (amongst other property) to the freehold tenements in *Meadow-street* and *Brunswick-road, Liverpool*, comprised in the conveyance of the 16th of June, 1841, together with the documents of title to certain railway and mining shares, accompanied by a memorandum in writing as follows:—

“To the Union Bank of *Liverpool*. In consideration of advances made and to be made by the banking company, called the *Liverpool* Union Bank, to me, I do hereby deposit with the said company the title deeds, certificates for shares, and documents mentioned in the schedule hereunder written, as a security to the said company for the general balance of account as bankers and customer between them and me, or of me and any person or persons who may join me in partnership, for bills or notes discounted or paid, and for loans, credits, or advances made to or for the accommodation, or at the request of me the said *W. Slater*, or of such partner or partners as aforesaid, and for interest and commission, and other usual charges and expenses; and I undertake and agree, upon the request of the directors for the time being of the said company, and for better securing the said balance, to release, transfer, and assure, in due form of law, to such person or persons as they shall direct, all and singular the lands and hereditaments, and the messuages and buildings thereon, and

all and singular the railway and other shares, and other the property mentioned and comprised in the said schedule hereunder written, for all my estate and interest therein, by way of mortgage, with full and absolute powers of sale, and of giving good and sufficient receipts to purchasers; but the sum to be secured by this deposit and memorandum shall not exceed 2000*l.* As witness my hand, the 21st day of July, 1841, *William Slater.*"

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At the foot of the memorandum was a schedule of the deeds, certificates, and documents which were the subject of the deposit.

On the 9th of February, 1842, *William Slater* became bankrupt, and the Defendants *L. Frost*, *P. Haskayne*, and *C. Turner* were chosen and appointed assignees. At the time of the bankruptcy, the Union Bank claimed a balance of 944*l.* 6*s.*, to be due from *William Slater* on the account referred to in the memorandum.

The bill was filed in November, 1844, by one of the registered public officers of the Union Bank, against the assignees in the bankruptcy; the trustee of the deeds of the 16th of June, 1841; *William Slater*, his wife, and their infant children. The bill alleged, that the property comprised in the deeds and documents deposited with the bank was a scanty and insufficient security for the debt; that the indentures of the 16th of June, 1841, were made without any good or valuable consideration; and that they were fraudulent and void as against the Union Bank, and were of no effect as against the equitable mortgage of the premises made by the said deposit; that, at the time of the execution of the indentures of the 16th of June, 1841, *William Slater* was indebted to the Union Bank in the sum of 600*l.* and upwards for his own private debt, was liable upon

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various bills of exchange to the amount of 2000*l.*, and upwards, and was indebted to various other persons in an amount considerably exceeding in the whole what he was able to pay or secure, without the estates and hereditaments comprised in the said indentures; and that the said indentures were therefore fraudulent and void, as against all the creditors of *William Slater*.

The bill prayed, that the two indentures of the 16th of June, 1841, might be declared fraudulent and void, and might be delivered up to be cancelled, or, at all events, that they might be declared fraudulent and void so far as the same related to such part of the property comprised therein as was comprised in the deeds and writings deposited with the bank; and that an account might be taken of what was due to the bank upon the security of the property, the title deeds, certificates, and other documents relating to which were deposited by *Slater* with the bank; and that the sum which should be so found due might be declared to be a charge upon such property; and that the Defendants might be decreed to pay such sum, with the costs, or, on default, that the said property might be sold, and the proceeds applied in or towards payment of the sum so found due, and costs. But if the Court should be of opinion that the Plaintiff was not entitled to a sale of the said property, then the bill prayed that the Defendants might on default of payment be foreclosed; and that the Defendant, the trustee, and all necessary parties, might be ordered to execute all proper conveyances, assignments, and assurances of the said property as the bank should direct.

The Defendants the assignees did not dispute the debt of the Plaintiff, or the security created by the deposit. The Defendant *William Slater*, by his answer, said that the conveyance of June, 1841, had been

made in consideration of monies which he had received in right of his wife since his marriage, and which he considered it his duty to settle for her separate use. He denied that he was insolvent at the time of the execution of the deeds of June, 1841, and, on the contrary, alleged that his property, (exclusive of the property conveyed by the said deeds), exceeded in value by several hundred pounds, the amount of his then debts and liabilities. The trustee and the cestui que trusts under the indentures of June, 1841, repeated the statements of *William Slater*, alleged that the mortgaged property was an ample security for the Plaintiff's debt, and insisted on the validity of the conveyance under which they claimed. Evidence was given on behalf of the Plaintiff of various debts owing by *William Slater*, at the date of the conveyance of June, 1841, but the Court did not hold that such evidence was sufficient to prove insolvency.

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Mr. Romilly and Mr. Rolt, for the Plaintiff.—The bank is a purchaser of the lands in *Meadow-street* and *Brunswick-road*, and the conveyance of June, 1841, is fraudulent and void as against the bank, under the stat. 27 Eliz. c. 4. It is not important for this purpose that the bank is only equitable mortgagee, for the Court, under the statute, will give effect to an equitable as well as to a legal title: *Buckle v. Mitchell* (a). The Plaintiff being indebted at the time of making the conveyance of 16th of June, 1841, that conveyance is fraudulent and void as against creditors, under the stat. 13 Eliz. c. 5. It is not necessary that the Plaintiff should prove that the debtor was indebted to the extent of insolvency: *Townsend v. Westacott* (b). The Plain-

Argument.

(a) 18 Ves. 100.

(b) 2 Beav. 340; S. C., 4 Beav. 58.

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tiff is entitled to a decree for sale of the property comprised in the mortgage: *Parker v. Housefield* (a). And he is also entitled to a declaration that the conveyance of June, 1841, is fraudulent and void as against creditors, under the stat. 13 Eliz. c. 5; and after that declaration he may pursue his remedies for the deficiency which the mortgaged property may be insufficient to pay.

Mr. *Anderdon* and Mr. *Adams*, for the assignees of *Slater*.—The Plaintiff, as equitable mortgagee, is entitled to a decree for foreclosure; he is not entitled to a decree for sale: *Price v. Carver* (b); *Meller v. Woods* (c); *Brocklehurst v. Jessop* (d); *Seton Decrees*, 178—180. The result of the proof by the Plaintiff that *Slater* the bankrupt was indebted at the time of making the conveyance of June, 1841, and that such conveyance is therefore void under the stat. 13 Eliz. c. 5, is, that the property, after satisfying the mortgage to the bank, becomes vested in the assignees in the bankruptcy: *Walker v. Burrows* (e); *Doe d. Grimsby v. Ball* (f); *Norcutt v. Dodd* (g). If the deed be void under the stat. 13 Eliz. c. 5, as against any creditor, the subject of the conveyance immediately becomes applicable for the benefit of all the creditors: *Richardson v. Smalhood* (h). The assignees here represent all the creditors, and the declaration of the Court should therefore be, that the conveyance of June, 1841, is fraudulent and void under the stat. 13 Eliz. c. 5; and that, subject to the equitable mortgage as to part, the property comprised in the conveyance has become vested in the assignees; and the assignees

(a) 2 Myl. & K. 419.

(b) 3 Myl. & Cr. 167.

(c) 1 Keen, 16.

(d) 7 Sim. 439.

(e) 1 Atk. 93.

(f) 11 M. & W. 531.

(g) 1 Cr. & Ph. 100.

(h) Jac. 552.

will have the usual time given them to redeem; or, if the Court should decree a sale, the surplus proceeds, after satisfying the Plaintiff, will be decreed to be paid over to the assignees.

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Mr. *Kenyon Parker* and Mr. *Craig*, for the Defendants the trustees under the deed of the 16th of June, 1841, and the wife and children of *William Slater*, the cestui que trusts under the same deed.—The Plaintiff has not succeeded in establishing either the fact that *Slater* was indebted at the time of the conveyance to any party who is now a creditor on his estate in respect of such debt, or that *Slater* was not then solvent. There may have been debts existing at the time; but it does not appear that any of the present debts then existed; and how can the statute of the 13 Eliz. c. 5, be made to render a conveyance void against creditors whose debts are subsequently contracted: *Kidney v. Coussmaker* (a); *Lush v. Wilkinson* (b). If that were the effect of the statute, every provision which a party had made for his family, at a period when he was perfectly solvent, might be defeated by his subsequent losses in trade, without any imputation of fraud. Every subsequent creditor might, on the suggestion, that, at the time a voluntary conveyance was made, the author of the deed owed a sum of money to some other party, unravel transactions which took place many years before such creditor had any transactions with, or was even known to the debtor. The statute is directed to cases where the conveyance is made with the intent to avoid the debt or duty of others, and then it is declared to be void as against the party only whose debt or duty is so endeavoured to be avoided. How can that apply to creditors who are not in existence when the act is done?

(a) 12 Ves. 136.

(b) 5 Ves. 384.

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Stephens v. Olive (a). The case of the Plaintiff, so far as it is founded on the stat. 13 Eliz. c. 5, is adverse to that of the creditors, who are represented by the assignees; for the essence of the relief under that statute is, that it is given for the benefit of all creditors, whilst the Plaintiff seeks the application of the property in satisfaction of the bank debt alone. But the case is unnecessarily and improperly put by the Plaintiff on the stat. 13 Eliz. c. 5; and, so far as it is founded on that statute, the bill cannot be sustained. Nor, with regard to the relief which is asked under the stat. 27 Eliz. c. 4, is the Plaintiff in a position to sustain his suit. The authority for the suit by an equitable mortgagee is founded on *Buckle v. Mitchell*: in that case the Plaintiff might have maintained his action for damages at law, but he chose to proceed in equity for specific performance; and Sir *W. Grant* said some ground must be made for refusing him the assistance of the Court—the Court did not arbitrarily execute one contract and refuse to execute another; and he added, as the legal estate was in trustees, the question was, which party had the better title to call for the conveyance. Here the legal estate is in a trustee upon an express trust for the parties entitled under the conveyance of June, 1841. Is there any equity to take it from them? At law, a deposit of title deeds has been held not to prevail against a voluntary settlement; and the party with whom the deposit was made, has been held not to be a purchaser within the statute: *Kerrison v. Dorrien* (b). This is purely a question of law, and that case is therefore a distinct decision on the point. Supposing the Court to hold that the Plaintiff is entitled to relief under the stat. 27 Eliz. c. 4, at least it was his duty first to

(a) 2 Bro. C. C. 90.

(b) 9 Bing. 76; and see *Holford v. Holford*, 1 Cha. Ca. 217.

realise the other property comprised in the equitable mortgage, and, if there should be any deficiency, then to avail himself of any right he might have under that statute to obtain payment of the deficiency out of that part of the property which is comprised both in the mortgage and in the voluntary conveyance; and even in that view the suit is premature.

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Mr. *W. M. James*, for the Defendant *William Slater*.

The pleadings in this cause have been rendered voluminous, and the suit expensive, owing to the claim which has been made under the stat 13 Eliz. c. 5. If the suit had been brought under the stat. 27 Eliz. c. 4, the only fact to be proved in order to raise every question would have been the deposit and memorandum. The case on the prior statute must fail. No single creditor can, after the bankruptcy or insolvency of the debtor, file a bill under that statute. If the deed be void on that ground, it must be so as against all creditors, and the estate then becomes the subject of administration by the assignees in the bankruptcy or the insolvency. The right to recover it for that purpose is *their* right, and not the right of any particular creditor: *Doe d. Grimsby v. Ball*. The circumstance, that the particular creditor is also equitable mortgagee, does not affect the case. If his security be sufficient, he has no claim beyond it; and if it be insufficient, his claim is like that of another creditor to prove for the difference. Before a plaintiff could be entitled to relief in equity under the statute, he must place himself in a situation to complain of the conveyance by obtaining judgment at law for his debt: *Colman v. Croker (a)*.

(a) 1 Ves. jun. 160. See *Empringham v. Short*, 3 Hare, 471; *Rider v. Kidder*, 10 Ves. 360.

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Judgment.

VICE-CHANCELLOR:—

On the 21st of July, 1841, *William Slater*, who carried on business in partnership with two persons of the names of *Antrobus* and *Irvine*, deposited with the Union Bank of *Liverpool* title deeds and documents relating to freehold and other property, including certain freehold tenements in *Meadow-street* and *Brunswick-road*, as a security for the balance which was or might become due from *William Slater*, or his firm, to the bank; and by the agreement in writing accompanying the deposit he undertook to execute a legal mortgage of the property comprised in the deeds and documents as the bank should direct, but the sum to be secured was not to exceed 2000*l.* On the 9th of February, 1842, *William Slater* became bankrupt. The balance claimed to be due to the bank from *William Slater* at the time of the bankruptcy was 944*l.* 6*s.*, and that amount is now claimed by them. Stopping here, the claim of the Plaintiff for what is due, and to have the same raised in the ordinary manner upon the property comprised in the security, is clear. The contest between the parties arises out of what follows:—It appears, that, on the 16th of June, 1841, about a month before the time of the deposit, *William Slater* had conveyed to *Daniel Antrobus*, as trustee, together with other property, that part of the property comprised in the Plaintiff's security which consisted of the tenements in *Meadow-street* and *Brunswick-road*, upon trust to sell and apply the proceeds for the benefit of *William Slater*, his wife and children. This conveyance was voluntary. Now, to obtain the benefit of his security, the Plaintiff must avoid the conveyance of June, 1841; and, accordingly, the bill raises two points. It insists, first, that the Plaintiff is a purchaser for good consideration under the stat. 27 Eliz. c. 4, and that therefore the deeds of June, 1841, are void as against him, so far as they comprise the property

in *Meadow-street* and *Brunswick-road*; and, secondly, the Plaintiff contends that *William Slater*, at the time of executing these deeds, was indebted to the Plaintiff and other persons to an amount exceeding what he was able to pay or secure, excluding the property comprised in the deeds; and that therefore the deeds of June, 1841, are void under the stat. 13 Eliz. c. 5. I will first state my opinion upon these points, so far as the decree I now propose to make requires that I should do so.

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As to the first point, that the deeds of June, 1841, are void under the stat. 27 Eliz. c. 4, it seems to me that the case of *Buckle v. Mitchell* (a) is a direct authority for the proposition, that an equitable interest in land entitles a purchaser by contract to clothe it with the legal title. By that case I consider myself bound, and that will entitle the Plaintiff to avoid the deeds of the 16th of June, 1841, and to enforce his security.

With regard to the second question, the Plaintiff being entitled to relief under the stat. 27 Eliz., it would have been unnecessary for me to notice his claim for relief under the stat. 13 Eliz., were it not that the Defendants have contended that this ground of claim for avoiding the deeds of June, 1841, has altogether failed, and that therefore the Plaintiff must pay so much of the costs of the suit as have been incurred in respect of that claim. Those who have contended that the Plaintiff's equity could not be sustained under the 27 Eliz. cannot with success urge that argument, unless they can shew that the claim under the 13 Eliz. cannot be sustained on the present record, or that the evidence in the cause is insufficient to sustain the

(a) 18 Ves. 100.

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case. Both of these points were argued. I think the former should be decided in the Plaintiff's favour. My view of the case is this:—The Plaintiff, after the deposit which was made on the 21st of July, 1841, discovered the existence of the previous deeds of the 16th June, 1841. If the deeds of June, 1841, are to stand, the deposit becomes valueless, so far as it relates to the *Meadow-street* and *Brunswick-road* property. The Plaintiff, therefore, has a direct interest in shewing that those deeds are invalid; for he thereby gives validity to his own security. Being a creditor having a specific interest in part of the property comprised in the deeds of June, 1841, he has an interest sufficient to sustain the suit; and, without at this time giving an opinion how far, in a suit framed as this suit is, the parties could, if they desired it, have the deeds of June, 1841, set aside, and the whole property which was conveyed by those deeds distributed amongst the creditors of *William Slater*; or whether, in a suit otherwise properly framed for that purpose, it is necessary for creditors seeking to set aside a conveyance as fraudulent under the stat. 13 Eliz. c. 5, to obtain a judgment at law, as was argued from the case of *Colman v. Croker* (a); or whether, if it be so, the bankruptcy of the mortgagor would not excuse the necessity of such a proceeding by a person having a specific lien on part of the property; or whether, if the Plaintiff's relief depended wholly on the stat. 13 Eliz. c. 5, the evidence of insolvency is sufficiently clear for a decree without inquiry,—I think the right to sue in this case is established; and that the evidence, if not already sufficient, is such as would entitle the Plaintiff to an opportunity of perfecting it. The question on this point is merely one of costs, and, the evidence being strong, it is sufficient to say, I think

(a) 1 Ves. jun. 161.

there is no ground for distinguishing the costs of that part of the suit which is founded on the 13 Eliz. c. 5, from the other costs.

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The next question is, as to the form of the remedy to which the Plaintiff is entitled,—whether the decree is to give the Plaintiff the benefit of a legal mortgage, or to direct a sale. The decisions with regard to the right of an equitable mortgagee are not uniform; but, in this case, the express terms of the contract are, that *Slater* shall convey the premises by way of legal mortgage, and that such mortgage shall contain a full and absolute power of sale; and to make the suit available for its objects, it is necessary that there should be a decree for sale. There is no reason, therefore, why such a decree should not be made.

THIS Court doth declare, that the Plaintiff is a purchaser for good consideration within the intent and meaning of the act of the 27th of Elizabeth, ch. 4, intituled “An Act against Covinous and Fraudulent Conveyances;” and that the deeds, dated the 16th day of June, 1841, are void as against the Plaintiff, so far as the same comprised the property in *Meadow-street, Liverpool*, and *Brunswick-road*, near *Liverpool*, in &c.; and which said property is also comprised in the memorandum of deposit dated the 21st day of July, 1841. And it is ordered, that the Master, to whom &c., do take an account of what is due to the Plaintiff for principal and interest upon his security, in &c. And it is ordered that it be referred to the Taxing Master, &c., to tax the Plaintiff his costs of this suit. And it is ordered, that the Defendants do pay to the Plaintiff the amount of such principal, interest, and costs, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint. And thereupon it is ordered, that the Plaintiff do deliver, upon oath, all deeds, papers, and writings in his custody or power relating to the premises in *Egremont*, in the county of *Chester*, and the aforesaid premises in *Meadow-street* and *Brunswick-road*, comprised in the said memorandum of deposit, as the Master shall direct. But in default of the said Defendants their paying unto the Plaintiff what shall be reported due for such

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principal, interest, and costs as aforesaid, by the time aforesaid, then it is ordered, that the said Master do ascertain and state to the Court what property there is which is comprised in the said security to the Plaintiff, which is not included in the said deed of the 16th day of June, 1841; and if the Plaintiff shall consent thereto, it is ordered, that the property remaining unsold, other than that comprised in the deeds of the 16th day of June, 1841, be sold with the approbation &c., wherein all proper parties are to join, &c. And it is ordered, that the produce thereof be applied in or towards satisfaction of the amount so to be found due to the Plaintiff. And if the produce shall be more than sufficient to pay and satisfy such last-mentioned amount, then it is ordered, that the residue &c., after payment thereof, be paid into the Bank, with &c., to the credit of this cause, subject to the further order of this Court; but if the produce of such sale shall prove insufficient to pay and satisfy such last-mentioned amount, then it is ordered, that the remainder of the said property comprised in the said plaintiff's security be sold, with the approbation &c., wherein all proper parties are to join, &c., and in order to such before-mentioned sale or sales, (production of all deeds and writings, &c.). And it is ordered, that the money to arise by such last-mentioned sale be applied, as far as the same will extend, or so much thereof as shall be necessary, in payment of the balance of the amount so to be found due to the Plaintiff. And if the produce thereof shall be more than sufficient to pay and satisfy such balance, then it is ordered, that the residue, &c., after payment thereof, (the amount to be verified by affidavit), be paid, &c., to the credit of this cause, subject to the further order of this Court. But, in case the plaintiff shall not consent to the sale or sales of the said premises in manner aforesaid, then it is ordered, that the whole of the property comprised in the said memorandum of deposit now remaining unsold be sold, with the approbation &c., wherein all proper parties are to join, &c. And in order to such sale, it is ordered, that all deeds and writings &c. And it is ordered, that the money to arise by the said sale be applied, first, in or towards satisfaction of the amount so to be found due to the Plaintiff; and if the produce thereof shall be more than sufficient to pay and satisfy such balance, then it is ordered, that the residue &c., after payment thereof, (the amount to be verified by affidavit), be paid &c., to the credit of this cause, subject to the further order of this Court. And it is ordered, that any sums to be paid into the Bank &c., when so paid &c., be laid out &c., in trust in this cause. Usual directions for investment of interest. And it is ordered, that the said Master do state to the Court what part of the produce is derived from the sale of the property included in the deeds of the 16th day of June, 1841, and what from the sale of the property not

included in such deeds. And if the produce of the sale or sales of the said property included in the said security to the Plaintiff shall be insufficient to pay the amount due to the Plaintiff, then this Court doth reserve the question as to what further rights the Plaintiff may be entitled to under the statute of the 13 Eliz. c. 5. Usual directions for taking accounts, &c., just allowances, consideration of further directions, and subsequent costs reserved. Liberty to apply.

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BENNETT v. BURGIS.

28th Feb.

ON the marriage of the Defendants, *Bennett* and his wife, in 1837, it was agreed that the interest of the wife, in a legacy of 500*L.*, bequeathed to her, and payable on her attaining twenty-one or marriage, and also her interest in remainder in a copyhold tenement, and in a small sum invested in the funds, expectant on the decease of her mother, should be assigned and vested in three persons as trustees, upon such trusts as the wife should appoint, and, in default of such appointment, in trust for her separate use for her life, without power of anticipation, remainder for the husband for life, remainder for the children of the marriage, as therein mentioned. Articles to the effect of this agreement were signed by the husband and one of the persons named as trustees. The wife was an infant. After the marriage, the executors of the person, by whom the legacy of 500*L.* was bequeathed, paid that sum to the husband and wife.

In a suit to appoint new trustees of a settlement, where a part of the trust property had been lost by previous negligence or breach of trust, the Court refused to confine the trust to the remaining property, but appointed the new trustees to be trustees of the whole of the property comprised in the settlement, directing (for the protection of the new trustees) a reference to inquire whether it would be proper to take proceedings for the recovery of the property which had been lost.

Statement.

In 1845, the copyhold property and the stock became vested in possession in the parties interested under the articles; and the bill was then filed by the infant children of the marriage against the husband and wife, and the survivors of the persons named as trustees (the trustee who had signed the articles being stated to have died insolvent), and against the provisional assignee of

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the husband, who was an insolvent debtor, praying that a settlement might be executed according to the articles, and that new trustees might be appointed of the trust property, other than the 500*l.* which had been so misapplied. The Defendants named as trustees in the articles, by their answers, said they had never accepted the office, but were willing to do so with the sanction of the Court. The provisional assignee disclaimed all estate and interest in the trust property.

Argument. Mr. *Drewry*, for the Plaintiffs.—The bill seeks to have trustees appointed of the residue of the trust funds, not of the whole property, which, according to the articles, ought to have been settled. New trustees, or trustees now to be appointed, could not reasonably be expected to undertake the responsibility of accounting for the loss of the 500*l.* The executors by whom the legacy was paid to the husband and wife, are not, and could not properly be parties to this suit; and therefore it cannot appear in this suit whether the sum was so paid by the executors with or without notice of the articles for the settlement, or whether, if improperly paid by them, it can be recovered. If, therefore, the settlement, now to be executed by the trustees, were to comprise the legacy, there would be nothing appearing in the suit to discharge the new trustees from responsibility with regard to that fund.

Mr. *Follett*, Mr. *Grove*, and Mr. *Hargrave*, for the other parties.

Judgment. The VICE-CHANCELLOR said, it would be improper to appoint trustees of a part of the trust property, omit-

ting the remainder. He knew of no precedent of such an order; the effect of it might be to discharge parties who were answerable for the breach of trust from their liability, or at least to interpose difficulties in the way of the cestuis que trust in recovering the trust fund which had been misapplied. The new trustees might be protected by the order of the Court, without omitting any portion of the trust property. He would refer it to the Master to appoint new trustees of the entire property comprised in the articles, at the same time directing the Master to inquire what property was comprised therein, and whether any and what part thereof had been lost; and if he should find that any part thereof had been lost, then to inquire and state under what circumstances the same had been lost, and whether any, and if any what, steps ought to be taken for the recovery thereof.

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—
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THE Court, upon the report of the Master, finding, with the other facts of the case, that, since the receipt of the 500*l.*, the husband had been discharged by the Court for the Relief of Insolvent Debtors, and his property had become vested in the provisional assignee; and that he had not acquired any property since his discharge; that the deceased trustee had died intestate and insolvent, and previously to his death had been supported by his friends, and that he had no legal personal representative; and that it would not be fit or proper that any steps should be taken to recover the 500*l.*—directed the settlement to be executed in conformity with the articles, and confirmed the appointment of the trustees who had been named therein to be trustees thereof.

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30th April &
7th May.

Lord BROOKE v. ROUNTHWAITE.

Bill by the vendor for the specific performance of a contract to purchase a timber estate, where the particulars of sale described it as comprising a certain wood "with upwards of sixty-five acres of fine oak timber trees, the average size of which approached fifty feet," and in the particulars of the lot described it only as "sixty-five acres two roods and twelve perches of growing timber." It appeared, on the evidence for the Plaintiff, that the average size of the trees was about thirty-five feet, but on that for the Defendant that it was only about twenty-two feet; and the Defendant, moreover, alleged that it was sold at a time when he had no means

A BILL for the specific performance of a contract. The property was offered for sale at the Auction Mart, *London*, in July, 1844, and was described as follows:—"Particulars of the residue of the late Lord *Monson's* estates in *Lincolnshire*, devised to be sold, comprising *Ingleby Wood*, with upwards of sixty acres of fine oak timber-trees, the average size of which approaches fifty feet; and also a quantity of ash poles, from ten to twenty years' growth." The Particulars of Sale then pointed out the facilities which existed for bringing the timber to market; and the description of the lot, to which the question in this cause related, was as follows:—"Lot 1 consists of *Ingleby Wood*, which contains sixty-five acres two roods and twelve perches of growing timber, chiefly oak and ash poles. It is at present in hand, and the only outgoing is 1*l.* 7*s.* 3*d.* land-tax, and parish rates 1*l.* 15*s.*" By the ninth condition of sale, which was the only condition material to the question, it was provided as follows:—"If, through any misstatement, any error should arise in this Particular, the same shall not vitiate the sale; but the purchaser shall take or make an adequate compensation, in proportion to the purchase-money, as the case may happen; such compensation to be settled by the referees, or their umpire, to be appointed in the usual manner." The Defendant, by his agent, was the highest bidder for Lot 1, at the price of 4725*l.*; and, by letter, promised to pay the deposit of

of seeing the wood, and that he relied on the particulars of sale:—*Held*, that, as the representation on the particulars of sale had proved to be incorrect, and as it was not shewn that the Defendant knew it to be incorrect at the time of making the contract, the Court would not, at all events, enforce the specific performance of the contract without compensation; and that (inasmuch as the particulars of sale did not express what number of trees or quantity of timber the wood contained) it was not a case in which the Court could measure the extent of the deficiency, or ascertain the amount of compensation; and that the bill must therefore be dismissed.

10*l*. per cent. and the auction duty in ten days. After the specified time had passed, the Defendant proposed to pay a moiety of the deposit, and the rest at the end of a month, and to allow the residue of the purchase-money to remain on the security of the estate. The Plaintiff offered to agree to the former, but not to the latter term. The Defendant afterwards refused to complete the purchase.

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 v.
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 WAITE.
 Statement.

The bill prayed a decree for specific performance of the contract; and that, in case it should appear that any abatement out of the purchase-money ought to be made on the ground of error or misdescription of the premises, the amount of such abatement might be determined by the Court.

The answer of the Defendant objected to perform the contract, on the ground, as was alleged, that the average size of the trees in *Ingleby Wood* did not approach fifty feet, and did not amount to more than about twenty-two feet; that the value of oak timber of the larger was very much greater than of the smaller size; that, from the season of the year before the purchase, there was no opportunity for the inspection or examination of the wood; and that the Defendant's bidding had been founded entirely on the representation made by the Plaintiff in the Particulars of Sale.

The evidence for the Plaintiff went to shew, that the timber-trees in *Ingleby Wood* were of the average size of thirty-four feet six inches each, reckoning those only to be timber-trees which contained at least ten cubic feet of wood; and the witnesses deposed, that, according to the custom of the trade, a timber-tree should contain that quantity. The witnesses for Defendant deposed, that there were a much larger number of timber-trees

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in the wood, including in that description (as they alleged should be included) all trees containing five cubic feet and upwards; that the effect of this computation was to reduce the average size to twenty-two feet each, and to reduce the value of the timber per foot in nearly the same proportion; for, if a tree containing fifty feet was worth three shillings per foot, a tree of twenty-two feet would be worth only two shillings per foot.

Argument.

Mr. Romilly and Mr. Shadwell, for the Plaintiff.—There was no misrepresentation of the subject. The description of “Lot 1” was perfectly accurate. The short and general description at the head of the Particulars of Sale could not be considered to form a part of the representation on which a purchaser would rely. That part of the announcement was too indefinite to convey any erroneous impression; it would, in fact, be true, even if the trees had been much smaller than they now are, for still the timber was approaching the size referred to. But, in fact, the difference between the average size, as stated in the Particulars, and that as shewn by the evidence for the Defendant, arose not from any deficiency in the wood, but from its actual excess, and from the fact that the Defendant took into the computation a vast number of trees containing less than ten cubic feet of wood, and which ought not to be reckoned as timber-trees. By this mode of measuring the wood, it was plain that the Defendant could not diminish the average size of the timber, without at the same time, and in the same proportion, increasing its aggregate quantity. It was not a case in which the Court would hold the Defendant to be entitled to compensation; there was no difference between the representation, which was indefinite, and the actual fact. The Defend-

ant should not have purchased without adequate examination: *Trower v. Newcome* (a). It was not a case in which fraud was or could be suggested: *Fenton v. Browne* (b).

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 v.
 BOUNTY-
 WAITE.
 —
Argument.

Mr. *Wood* and Mr. *Malins*, for the Defendant.—The Defendant is a timber-merchant, and he contracted for the purchase of the wood as timber, and for the purposes of his trade. The deficiency in the average size of the trees, as timber, would not therefore be compensated by the greater number of the trees, of a smaller size, even if there were, in fact, a greater number than the Defendant was entitled to expect. It was not, however, shewn that the number was greater, although it was proved that the average size was far less than half of what it had been represented to be. The Defendant was willing to complete his purchase upon having a compensation made for the deficiency in the size and value of the wood, according to the provision of the ninth condition of sale; there would be no difficulty in ascertaining the amount of compensation, for the maximum and minimum sizes were both defined, and the difference was a matter of ready calculation: *Hill v. Buckley* (c). If the Court cannot measure the compensation, it will certainly not compel the Defendant to complete a purchase, where the subject proves to be totally different from that which he was led to expect.

VICE-CHANCELLOR :—

The Defendant in this case contends, that, if he should be compelled simpliciter to perform this contract, he will not obtain, in the subject of his purchase, that which

7th May.
 —
Judgment.

(a) 3 Mer. 704.

(b) 14 Ves. 144.

(c) 17 Ves. 394.

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the Conditions of Sale promised him; that the timber-trees do not in the average approach to fifty cubic feet; and he insists that, if the contract is to be performed in specie, he is entitled to compensation for the difference in the value of the timber. The complaint is, that the value of the timber varies according to the growth of the tree; and that a cubic foot of timber cut from a tree containing fifty feet, is of greater value than a cubic foot of timber from a tree containing only five feet. He alleges that there are, in *Ingleby Wood*, only a given number of trees which can be accounted timber-trees; that their average contents are not more than twenty-two feet; and that such timber is of less value than if it were of the larger kind described in the Particulars of Sale. Upon these statements the Defendant asks for compensation for the difference in value.

I have certainly felt great difficulty in this case. I must consider the Defendant as asking that a decree may be made giving him compensation. The argument on his behalf is, that the Court, if unable to give him compensation, from the impossibility of measuring the amount to which the subject of the contract falls short of the description, would dismiss the bill rather than compel the Defendant to take that which he had a right to expect would be much more valuable than it has proved to be.

After reading the pleadings and evidence in the cause, I have found great difficulty in bringing my mind to believe that the defence set up is not a mere after-thought of the Defendant. It appears, from the answer, that the Defendant intends to represent that he bought the property without knowing anything of it, but from the recommendation of one *Jabez West*, who had himself no sufficient means of judging of the average size of the

timber, from having seen only a small part of the wood, when the trees were covered with foliage; and that *West* had relied on the representation contained in the Particulars of Sale. *Jabez West* has not been examined. Looking at the correspondence between the parties, it appears that, after the sale, the Defendant was unable to provide the money for completing the purchase, and that he applied for an unlimited time to complete his purchase, leaving the balance of the purchase-money on the security of the estate; and it was not until this indulgence was refused, upon the ground that the property comprised in the purchase was trust property, that he took the objection that the timber was not of the kind he supposed it to be. I have endeavoured to discover whether, if the Defendant should be compelled to take the property, he would or would not have given more than it was worth. He states the number of trees to be 1616, containing an average of twenty-two feet, worth two shillings a foot, which would amount in value to about 3500*l.*, omitting the tops, lops, and poles, which may not be inconsiderable. This leaves a small sum per acre for the land, which can scarcely exceed its value, unless it is of the very worst quality. If, however, there has been a misrepresentation, I cannot refuse the Defendant the benefit of that ground of defence, either in the way of compensation, or of a decree dismissing the bill,—merely upon such a speculation.

This is a case in which it is impossible to give compensation. If the vendor had represented that the wood contained any given number of trees, and that such trees were of an average size of fifty feet, and that representation turned out to be untrue, a decree for specific performance, with compensation, might have been made. The Court might have measured the difference between that which was promised, and the actual fact; but, in

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 v.
 ROUNTH-
 WAITS.
 Judgment.

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Lord Brooke
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the absence of any representation as to the number of trees, I do not see how it is possible for the Court to measure that difference; or how the amount of compensation is to be ascertained. If (to put an extreme case) the wood had been found to contain 1000 trees, averaging fifty cubic feet, and no trees between that size and mere poles, the Defendant admits that he would have no cause to complain, for the trees would have been of the promised average size, and there was no contract as to the entire quantity of timber to be found in the wood. But, according to the Defendant's argument, if there were, in addition to the 1000 trees I have supposed, another 1000 trees averaging five feet, the general average would be reduced to twenty-seven feet, and the purchaser would be damnified and entitled to compensation, though he had 5000 feet of timber more than in the first case, in which the contract would have been fully satisfied. He is injured, because, upon that hypothesis, in addition to a number of larger trees, he gets a number of smaller trees. It was at one time argued for the Defendant, that the Court ought to consider the vendor as selling the quantity of timber found in the wood, and guaranteeing that it was all of the size mentioned in the Particulars; but that view of the case cannot be maintained.

If, however, the Court is not able to see that the purchaser is damnified to a definite extent, capable of being ascertained, it may still be right to say that the vendor is unable to give the purchaser that which he promised; and if so, the Court may properly refuse to enforce the contract, though it cannot modify it by directing it to be performed with compensation. I agree that an indefinite representation by a vendor ought to put a purchaser upon inquiry; but a definite representation upon a point affecting the value of the subject of sale will

entitle the purchaser, if the representation be untrue, to resist the specific performance of the contract. This appears very distinctly from *Trower v. Newcome* (a), *Stewart v. Alliston* (b), *Fenton v. Browne* (c). Now, the sale in this case took place at a time of the year when the wood could not be viewed. I think, therefore, the representation made must, as against the vendor, be taken as a definite representation that the vendor knew the timber in the wood approached an average size of fifty feet. Was this representation untrue, and the Defendant thereby deceived? and if so, can I treat it as immaterial on the ground before alluded to, that the Particulars of Sale contained no representation as to the quantity of timber in the wood? This, I think, I ought not to do, though I acknowledge there is difficulty in the opposite conclusion. If the wood had consisted wholly of young timber-trees, it could not successfully have been contended that it was what the purchaser had contracted for, for the timber might be useless for years to come; though it might be difficult to say what degree of difference would be enough to vitiate the sale.

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 Lord BROOKS
 v.
 ROUNT-
 WAITE.
 Judgment.

The question, then, is, whether the representation was untrue or not. The witnesses for the Plaintiff and Defendant differ greatly, owing to the different modes in which they ascertain the quantity of timber,—one taking into account trees containing five cubic feet, and the other only those that contain ten. But the Plaintiff states that thirty-five feet is the highest average; and he admits that the Particulars of Sale would have been more correct, if, instead of stating the average as approaching fifty feet, they had stated it at forty. Was the Defendant, who is stated to be a timber-merchant, deceived by this representation? When I say that a

(a) 3 Mer. 704.

(b) 1 Mer. 26.

(c) 14 Ves. 144.

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vendor, who makes a representation that is untrue, cannot enforce his contract, that, of course, supposes that the purchaser is deceived; if the purchaser knows at the time that the representation is untrue, he is not deceived, and cannot in that case avail himself of the fact that there has been misrepresentation. I am far from being satisfied as to what the justice of the case requires. Looking at that part of the answer relating to *Jabez West*, I felt considerable doubt whether it might not appear that he had sufficient knowledge of the wood, and that he had not made any representation by which the Defendant could be deceived; but if this were so, it was the Plaintiff's duty to have made out that case, which he has not done. As it is, there has been a representation which turns out not to be correct, and I think the proper course will be to dismiss the bill, but without costs.

5th, 7th, &
17th Dec.

WINTER v. WINTER.

The testator, by a will made before the Wills Act (7 Will. 4 & 1 Vict. c. 26) came into operation, bequeathed a share of his residuary estate to one of his sons, who was also thereby made one of

the devisees in trust and executors of his estate. The son died after the Wills Act came into operation, leaving issue; and, after his death, the testator made a codicil to his will, altering a bequest to another child, but in other respects confirming his will:—*Held*, that the gift to the son did not lapse, but that the same, so far as it was real estate, descended to the heir at law of the son, and so far as it was personal, to his executrix, under a will made before the Wills Act came into operation.

That, under the 34th section of the Wills Act, the effect of the re-publication of the will by the codicil, was the same as if the testator had at the date of the codicil made a will in the words of the will so re-published.

personal estate and effects, upon trust, that they, the said *John Palmer Winter*, and *J. C. Cameron*, or the survivor of them, should, in their or his discretion, sell the same, and stand possessed of and interested in the monies, and the rents, issues, and profits of the said real and personal estate, until such sale, upon trust, to pay and discharge his the said testator's debts, legacies, and funeral and testamentary expenses, and to stand possessed of and interested in the surplus thereof in trust, as to, for, and concerning one equal sixth part or share thereof for his (the testator's) son, the said *John Palmer Winter*, for his own use and benefit absolutely; and as to the other five sixth parts or shares for his (the said testator's) other children and grand-children severally, as in the said will respectively mentioned. And the testator appointed the said *John Palmer Winter*, and *J. C. Cameron*, the executors of his will.

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v.
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—
Statement.

Anna Maria, a daughter of the testator, to whom a sixth share of the residuary estate was given by the will, died in March, 1838, intestate and unmarried. The said *John Palmer Winter*, the testator's said son, one of the devisees in trust and executors, and the residuary legatee of the sixth part of the real and personal estate of the testator, died on the 23rd of November, 1838, having by his will, made in 1824, bequeathed all his estate, real and personal, to *Mary* his wife, and appointed her his executrix. *Mary*, the widow of *John Palmer Winter*, proved this will on the 8th of December, 1838.

The testator, *John Winter*, made a codicil, dated the 16th of February, 1839, and thereby, after charging the share of his estate given by his will to his daughter, *Mary Gillman*, with the amount of a certain debt, he directed, that, after the decease of his said daughter, the remainder of the benefit given to her by his will should

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 v.
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 —
Statement.

go to other persons mentioned in his said codicil, and in all other respects he thereby ratified his said will.

On the 22nd of August, 1840, the testator, *John Winter*, made another codicil, which did not alter the foregoing devises or bequests.

The testator died on the 5th of February, 1843. The will was proved by *J. C. Cameron*, the surviving executor, by whom the greater part of the freehold, copyhold, and leasehold estates were sold, before the institution of the suit, and the proceeds invested in the government funds.

The bill was filed by *Charles Winter*, the eldest son of *John Palmer Winter*, who was the eldest son of the testator *John Winter*, against the other children and the executor of the said testator, and the widow and executrix and the younger children of *John Palmer Winter*, praying, that the rights of the several persons claiming to be interested in the real and personal estate of the testator might be ascertained and declared by the Court.

The facts were found by the Master's Report, and the cause was heard for further directions.

The principal question arose upon the effect of the 33rd and 34th sections of the Wills Act, 7 Will. 4 & 1 Vict. c. 26 (a), with reference to the sixth share of

(a) For the 33rd section, and the construction of that section, see *Johnson v. Johnson*, 3 Hare, 157. The 34th section enacts, "That this act shall not extend to any will made before the 1st day of January, 1838; and that every will re-executed or re-published or revived by any codicil, shall, for the purposes of this act, be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived."

the residuary real and personal estate, devised and bequeathed to *John Palmer Winter*, the son of the testator, *John Winter*.

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Argument.

Mr. *Romilly* and Mr. *Frederick Jones*, for the Plaintiff.—The effect of the 34th section is not to alter the date of the will, by bringing the date of the will down to the date of the codicil; but the effect is to give a retrospective operation to the act, and thereby make the act to govern the construction of the will, which, without the aid of the codicil, it would not have done. In other words, the will is, by means of the codicil, brought within the operation of the act for the purposes of construction, and in order so to bring it, the will must be read as if it had been made at the date of the codicil; but, for the purpose of determining the subject or object with which it deals, the will must be treated as being made at the time at which it actually bears date. The hypothesis or fiction that the will was made at the date of the codicil is adopted to give effect to the provisions of the act; but it is not pursued further than is necessary for that object, nor to the extent of transferring the date of the instrument from a time at which the object of the testator's bounty existed unto a time at which such object had no existence. With regard to the effect of the 33rd section, they cited and relied on *Johnson v. Johnson* (a).

Mr *Walker* and Mr. *Torriano*, for the Defendant, *Mary Winter*, the widow and executrix of *John Palmer Winter*, argued in support of the like construction. They insisted that the testator must, at the time he made the codicil, be deemed to have known the law, and the operation of the Wills Act upon the gift; and that,

(a) 3 Hare, 157.

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 —
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knowing it, he would have relied upon the effect of the former disposition, when revived by the codicil: *Skinner v. Ogle* (a). The revival of a will made before the Wills Act, by a republication since that act, has been held to bring it within the operation of the new law. *Andrews v. Thornton* (b), *Brooke v. Kent* (c).

Mr. *Willcock*, for the younger children of *John Palmer Winter*.

Mr. *Kenyon Parker* and Mr. *Stinton*, for the Defendant, *Mary Gillman*, one of the daughters of the testator.

Mr. *Wood* and Sir *Walter Riddell*, for the Defendants, the other children of the testator, *John Winter*.—The construction of the Wills Act, which would require the Court to read the will, as if of one date for one purpose, and as of another date for another purpose, is a construction too technical and artificial to be adopted, unless it be absolutely necessary. Where is the necessity of such a construction? The will may, without inconsistency, be read for all purposes, as if made at the date of the codicil. The testator at that time must be regarded as revising and finally settling the testamentary disposition of his property. If the testator gave a legacy to a child who was dead, it would be clearly a mistake, and a nullity; but if the testator actually made such a mistake, it was not the intention of the Legislature to correct his error. The object of the act was to guard against the negligence of testators, but not against their mistakes. After making a will, and disposing of property amongst children, there was a com-

(a) Prerog. Court Cant., 7th May, 1845. Reported in the Jurist, Vol. 9, p. 4 2.

(b) 3 Q. B. 177.
 (c) 3 Moore, P. C. C., 334.

mon tendency to postpone any further testamentary act, although the death of some of the children might have materially altered the circumstances of those who were justly supposed to be objects of the testator's bounty. It was in such cases that the Legislature interposed by the act, and prevented the children of a deceased child from suffering by the delay of the testator. When, however, the testator set himself to the task of revising his will, it must be regarded as if it was then for the first time made; and if he bequeathed a legacy to a party who was incapable of taking the property, the result, since the Wills Act, as well as before, must be that the legacy will fail. In this case, taking the will to have been made at the date of the codicil, it contained a gift to a person not in existence; and by such a gift nothing could pass. Suppose a testator to make a bequest to his children generally, could such a gift be construed to extend to his children dead at the date of the will? and yet, to carry the purposes of the act to the extent contended for, would involve that construction. They cited *Christopherson v. Naylor* (a), *Waugh v. Waugh* (b), *Tytherleigh v. Harbin* (c), *Doe v. Kett* (d); 2 Jarman, Tr. Wills, p. 682.

Mr. *Jervis*, for the Defendant, *J. C. Cameron*, the executor of the testator, *John Winter*.

VICE-CHANCELLOR:—

The testator, *John Winter*, by his will, dated the 13th of November, 1833, gave a share of his residuary estate to *John Palmer Winter*, his eldest son. The Wills Act, 7 Will. 4 & 1 Vict. c. 26, was passed on the 3rd of July, 1837, and made to come into operation (as regards

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 Argument.

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(a) 1 Mer. 320.

(b) 2 Myl. & K. 41.

(c) 6 Sim. 329, 332.

(d) 4 T. R. 601.

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—
Judgment.

the present case) from the 1st of January, 1838. In the year 1838, and after the Wills Act came into operation, *John Palmer Winter* died, leaving issue, which issue have survived the testator, *John Winter*. By a codicil, dated in February, 1839, the testator, *John Winter*, altered a bequest in his will, and in all other respects ratified and confirmed the same. On the 22nd of August, 1840, the testator made a second codicil. The testator has since died; and the question is, whether the legacy to *John Palmer Winter* has altogether lapsed, or whether, by the operation of the Wills Act, it shall take effect, as if the death of *John Palmer Winter* had happened immediately after the death of the testator; and this depends upon the effect of the republication, and upon the construction to be put upon the words "shall die," in the 33rd section of the act.

With respect to the republication, the case must be considered as if the testator, on the 16th of February, 1839, had made a will in the very words of the will of the 13th of November, 1833, in which case there would have been the bequest of a share of the residue to *John Palmer Winter*, who was then dead.

The question on the construction of the 33rd section is, whether the words "shall die" mean shall die after a bequest to him by a will made after the 31st of December, 1837, or whether they mean shall die after the act comes into operation. If the former meaning be given to the words, the claim of the representatives fails. If the latter, it is good. Upon the face of the act itself, I certainly can find nothing to exclude the latter construction in favour of the former; and in the absence of anything upon the face of the act to fix the meaning of the words, I am bound, as well as I can, to fix that meaning, by considering the policy of the act, and the objects it was intended to accomplish.

Now, the policy of the act, and the objects it was intended to accomplish, are, for the present purpose, sufficiently manifest. It was intended to prevent a portion given by a testator to a child going from the estate of such child, and his family from being left portionless, by reason only of the death of the child under certain circumstances—a consequence of law which the common feelings of mankind declared to be a disappointment of the intention of the father.

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The cases in which this event most commonly happened, and against which the act was intended to provide, were cases in which the child died in the testator's lifetime, after the bequest was made,—and cases in which the testator, in providing for an absent child, was ignorant of the fact, that such absent child was dead. In both cases, the family of the child dying after, or dead at the time of the bequest, was left unprovided for; and it was to remedy this evil, amongst others, that the 33rd section of the Wills Act was passed.

The construction of the act, which alone will include all the cases which the act must presumably have been intended to include, is that which makes the time of the legatee's death unimportant, provided he died after the act came into operation, and the bequest to him is by a will made after that date; and, as far as I can see, that construction cannot possibly include any case not obviously within the purposes of the act.

I may add, that if a testator, by a will executed before the Wills Act, had made a bequest to an absent child, who turned out to be dead at the time; and the will provided, that, if such child should die in the lifetime of the testator, leaving issue, who should survive the testa-

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tor, the bequest should still take effect, (which the act provides), I should in such a case have little difficulty in giving effect to the manifest intention of the testator. This is, in substance, the same case; for the will in this case was made after the act came into operation, and it must be understood as expressing what the act says shall be the consequence of it. It is true, that view of the question is not of itself sufficient to decide the present case, for I can only declare what the act empowers me to declare; and if the construction of the act be that the words "shall die" mean shall die after the making of the bequest, I could not have come to my present conclusion. I think, however, the sound construction of the Wills Act is, that, if the bequest be made after the act came into operation, the act will apply to a case where a child may have died before the will was made, but after the act came into operation.

1846.

13th & 16th

Feb.

A life insurance company received notice of an assignment, by an insurer, of a policy which the company had granted, and the insurer afterwards became bankrupt.

FENN v. EDMONDS.

THE Asylum Life Assurance Company granted a policy, dated the 31st of August, 1841, whereby they assured the sum of 2999*l.* to the Defendant, *Margaret Edmonds*, her executors, administrators, or assigns, to be paid within six months after the death of *Robert Stuart*.

Soon after the death of the person whose life was assured, the party to whom the assignment had been made applied for the payment of the sum due upon the policy, and the company inquired of the assignees of the bankrupt whether there was any objection to payment being made to the claimant. The assignees did not assent to the payment, but made no positive claim to the policy. In the meantime an action was brought upon the policy by the claimant, in the name of the bankrupt, against the company:—*Held*, that it was a case in which the company were entitled to file their bill of interpleader against the plaintiff in the action, the bankrupt, and his assignees; and that the assignees, who had in the suit shewn no title to the policy, must pay the costs.

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v.
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Statement.

On the 1st of March, 1842, the Asylum Company received notice, that, by an indenture, dated the 28th of February, 1842, the policy was assigned by *Margaret Edmonds* to the Defendant, *Thomas Dobson*, his executors, administrators, and assigns. It subsequently appeared that the monies secured by the policy and other property were assigned to *Thomas Dobson*, by way of security for a debt of larger amount, with power to *Dobson* to demand and sue for the said monies in the name of *Margaret Edmonds*, her executors or administrators.

On the 28th of November, 1842, a fiat in bankruptcy was issued against *Margaret Edmonds*, under which she was declared bankrupt; and the Defendants, *Patrick Johnson* and *David John Davies*, were appointed assignees.

Robert Stuart died in July, 1843; and, on the 17th of April, 1844, the 2999*l.* became payable under the policy, with interest from that date.

On the 24th of May, 1844, the solicitors of the Asylum Company, wrote to the solicitor of the assignees as follows:—"We have to apprise you, as solicitor for the assignees of Mrs. *Margaret Edmonds*' estate, that an application has been made to the Asylum Insurance Company, by Mr. *Dobson*, for payment of a sum of 2999*l.* upon a policy of assurance, effected with that company by Mrs. *Edmonds*, upon the life of Mr. *Robert Stuart*, and which policy it is stated has been assigned by Mrs. *Edmonds* to Mr. *Dobson*; and we have to request that you will inform us, whether the assignees have any objection to the payment being made to Mr. *Dobson*, or if they will concur in the discharge to the Company." In answer to this letter, the solicitor of the assignees, on the 27th of May, wrote as follows:—"I should have

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answered yours of the 24th earlier, but have been waiting to see Mrs. *Edmonds*, to hear her explanation of the matter; but although I have written her to come, she has not yet been. I will communicate with you as soon as possible."

On the 8th of June, *Dobson* brought an action on the policy, in the name of *Margaret Edmonds*, against the Asylum Company, to recover the 2999*l.*, and interest; and, on the 15th of June, the solicitors of the Company informed the solicitor of the assignees of the proceeding by the following letter:—"We have now to inform you, that an action has been brought in the name of Mrs. *Edmonds*, by Mr. *Fisher*, (who had been acting as the attorney for Mr. *Dobson*, but who is described in the writ as attorney for Mrs. *Edmonds*), against three of the Directors of the Asylum Company, to recover the amount of the insurance effected by Mrs. *Edmonds* on the life of Mr. *Stuart*, of which we have before apprised you; and we request that you will inform us, if the assignees of Mrs. *Edmonds*' estate, under the fiat in bankruptcy against her, claim the above insurance, or have any objection to the payment thereof being made by the Company to Mrs. *Edmonds* or Mr. *Dobson*, and will concur in the discharge to the Company." To this letter, the solicitor for the assignees replied on the 17th of June, as follows:—"I am not in a position to answer your letter, as I have written and sent to this bankrupt several times without success. There is no account of this matter in her balance sheet. I will, if you wish, call on Mr. *Dobson*, and see how he represents the matter." No further communication appeared to have taken place; and, on the 10th of July, 1844, the plaintiffs, two of the Directors of the Asylum Company, filed their bill against *Margaret Edmonds*, *Thomas Dobson*, and the assignees, stating the assurance, the notice of assignment, the

foregoing correspondence, and the action, and alleging that the assignees disputed the right of *Dobson* to the monies secured by the policy, and claimed the same as such assignees. The bill prayed that the Defendants might interplead; and that they might be restrained from suing the Company in respect of the policy. The 2999L and interest was thereupon paid into Court.

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Margaret Edmonds, the bankrupt, by her answer denied that she was in fact the Plaintiff in the action, although it was brought in her name, and submitted that she was not a necessary party to the suit. The Defendant, *Dobson*, claimed the monies due on the policy, under the assignment of the 28th of February, 1842, and admitted that he had brought the action in the name of *Margaret Edmonds*, against the Company. The assignees by their answers denied that they disputed the right of *Dobson* to the monies in question, and said that they had been unable to obtain any information respecting the policy, and neither claimed nor disclaimed the same; they submitted, that if there were any such policy, and the Defendant, *Dobson*, should not make out his title thereto, the monies due thereupon would belong to the assignees, as part of the estate of *Margaret Edmonds*, under the bankruptcy.

Mr. *Walker* and Mr. *Osborne*, for the Plaintiffs, submitted that this was an ordinary case of interpleader; and that the bankrupt, in whose name the action was brought, was a necessary party, in order that the injunction might be effectual: *Winch v. Keeley* (a). The existence of a legal right of action in one person, and an

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equitable title in another person, was in effect the same as a double claim: *Stevenson v. Anderson* (a). The assignment of the policy being by way of security only, left the right to sue at law in the assignees, *D'Arnay v. Chesneau* (b); and transferred the equitable interest to the Defendant, *Dobson: Carvalho v. Burn* (c).

Mr. *Spurrier*, for the Defendant Mrs. *Edmonds*, the bankrupt, submitted that, whether the Defendant was or was not a necessary party, she was still entitled to her costs of the suit.

Mr. *G. L. Russell*, for the Defendant *Dobson*.—The case is not one in which the suit can be sustained as an interpleading suit. There was, and is, in fact, no dispute as to the title of *Dobson*. The assignment is not impeached; and, without disputing the deed of assignment, the assignees had never any pretence or ground of claim: *Burn v. Carvalho* (d). The Plaintiffs have, therefore, no title to take their costs out of the fund: they have instituted a suit where there has, in fact, never been any adverse claim, and the costs of that suit must be borne by the Plaintiffs themselves. Even if the assignees be supposed to have had any right, yet they would have been bound, if the Company had paid the debt under the pressure of an action. Their utmost interest must have been a right to the surplus after satisfying the debt of *Dobson*, and that surplus they must have recovered against *Dobson*, and not against the Company.

The assignees did not appear at the hearing.

(a) 2 Ves. & Bea. 407.

Myl. & Cr. 702.

(b) 13 M. & W. 796.

(d) 4 Myl. & Cr. 702.

(c) 4 B. & Adol. 382; 4

VICE-CHANCELLOR:—

I must treat this case as a proper case for an interpleading suit. The assignment of the policy to the Defendant *Dobson* was, as it appears by his answer, made by way of security, and the same assignment comprised other property; leaving, therefore, the possibility of an interest in the bankrupt, which would have passed to the assignees. Consistently with the form of the notice, the assignment might have been made to *Dobson* as a bare trustee. Looking to the nature of the security, and the property which it comprised, and the right of action against the Insurance Company,—looking also to the correspondence which took place before the bill was filed,—and to the answers of the assignees in this suit,—which do not exclude their claim, I cannot say that the Company might not have been liable to pay the sum due upon the policy a second time, if they had not instituted this suit.

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Judgment.
16th Feb.

DECLARE, that, subject to the payment of the costs of the Plaintiffs, and Defendant *Margaret Edmonds*, the Defendant *Thomas Dobson* is entitled to the 3059*l.* 3*s.* 3*d.* stock standing &c., in trust in this cause, and to 89*l.* 2*s.*, the dividends &c. Tax the Plaintiffs and the Defendants, *Thomas Dobson* and *Margaret Edmonds*, their costs of this suit. Let such costs be paid out of the said 89*l.* 2*s.* &c., if sufficient for that purpose. But if insufficient, then let so much of the 3059*l.* 3*s.* 3*d.* stock, as with the 89*l.* 2*s.* &c., will be sufficient to raise the amount of the said costs, be sold &c.; and out of the monies &c., let the said costs be paid in manner &c.; and let the said sum of 3059*l.* 3*s.* 3*d.*, (if no part be sold as aforesaid, or, if part sold, the residue), be transferred to the Defendant *Thomas Dobson*, and let the residue of cash &c. (if any), be paid to the Defendant *Thomas Dobson*. And let what shall be paid out of the said cash and stock for such costs be paid by the Defendants, the assignees, to the said Defendant *Thomas Dobson*.

Decree in interpleading suit.
Minute.

1846.

21st & 22nd
December.

The plaintiff in a cross suit, (impeaching an instrument which the original suit seeks to enforce) although residing out of the jurisdiction, is not bound as against the Plaintiff in the original suit, to give security for costs.

VINCENT v. HUNTER.

MR. SCHOMBERG moved to discharge for irregularity an order which the Defendant had obtained, on a motion of course, that the Plaintiff, who appeared by the bill to be residing out of the jurisdiction of the Court, should give security for costs. The present motion was made on the ground that the Plaintiff's bill in this cause was a cross-bill, rendered necessary or proper by the original bill, which the Defendant had brought against the Plaintiff: *Sloggett v. Viant (a)*, *Thornton v. Wilson (b)*.

Argument.

Mr. Romilly and Mr. Southgate, for the Defendant.—We do not deny, that, where the Plaintiff, in a mere cross-bill, is out of the jurisdiction, the Defendant, having originally commenced the proceedings, is not entitled to ask for security for costs; but this suit goes much further than a mere cross suit. And even if the Defendant be not entitled to the security in this case, there is still nothing irregular in the order. It was obtained on motion, without any untrue suggestion; and the present motion, which assigns irregularity as the ground for discharging the order, must be therefore refused.

VICE-CHANCELLOR:—

Judgment.

The original bill seeks to enforce a charge or security which the Plaintiff alleges that he has on the estates of

(a) 13 Sim. 187.

(b) 1 Hogan, 20.

the Defendant in that suit; and the Defendant in that suit has filed his bill, in which he impeaches the alleged charge upon which the original bill is found, and seeks to have it set aside on the ground of fraud. This is a relief which, if he be entitled to, he cannot have by way of defence simply to the original suit; and this suit must, therefore, be considered as strictly a cross-bill. It is perfectly just, when a plaintiff has brought a defendant into court, by instituting proceedings against him, and a cross suit is the necessary or proper form of defence, that the defendant should be treated as a defendant throughout, and not be required to give security for the costs of the cross-bill, which, in truth, is merely defensive; and this, it appears, has been decided.

An application to discharge an order for irregularity supposes that it ought not, according to the course and practice of the Court, to be allowed to stand. I do not think, however, that I ought to refuse the order which is now asked, merely because the notice of motion incorrectly applies the word "irregularity."

Order discharged.

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 Judgment.

1846.

5th & 11th
June.

A tenant in common occupying the premises held in common not excluding his co-tenants in common, is not chargeable by such co-tenants with an occupation rent.

Statement.

M'MAHON v. BURCHELL.

THIS case is reported on the original hearing, 3 Hare, 97; and upon appeal, in Mr. Phillips' Reports, Vol. 2, p. 127 (a)—

The Master reported that the Plaintiff, *William M'Mahon*, occupied the "Lower house" during the time he was engaged in the administration of the estate of *Terence*, the father, and ought not to be charged with any rent for such time; and that he had occupied the house at other times for which he ought to be charged with rent; that he had paid certain sums for outgoings and repairs; and that there was nothing in his hands in respect of the occupation of the house applicable to the legacies.

The Plaintiffs did not except to the report. The Defendants took exceptions; and among others, that *William* ought not to be allowed in his discharge the repairs and outgoings which had been allowed by the Master; and that the Master ought to have found assets in the hands of *William* applicable to the legacies.

The Court, overruling several of the exceptions, declared, that the Plaintiff, *William*, ought to be considered and treated as tenant in common of one undivided seventh part of the "Lower house," and referred it to the Master to inquire, whether any and which of the

(a) On appeal to the Lord Chancellor, the original decree was altered by excluding the inquiry whether any sums were due by the Plaintiff in respect of his occupation of the pre- mises; but, on the point raised as to the liability of a *tenant in common* to be charged with an occupation rent, the principle of the above decision was confirmed. See 2 Phillips, 134.

sums found by his report to have been paid by the Plaintiff, *William*, since the death of *Terence*, in respect of repairs and outgoings, or otherwise, on account of the said Lower house, ought to be allowed to him during such time, having regard to the declaration. On this reference the Master reported the sums which ought to be allowed to *William* for repairs and outgoings, but did not find any monies to be in his hands. This report was not excepted to.

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v.
BURCHELL.
Statement.
4th May.

The case came on for further directions.

Mr. Romilly and Mr. Bagshawe, for the Plaintiff.

Sir F. Simpinson, Mr. Hislop Clarke, and Mr. Rolt, for the Defendants.

11th June.
Judgment.

VICE-CHANCELLOR,—after stating the proceedings which had been had in the cause, before the Report of the 4th of February, 1845:—The Plaintiffs, by their state of facts, as in their amended bill, insist on the fact, that *William* never had any exclusive occupation of the Lower house; that such of the children of *Terence* as lived on the island resided in the house as well as himself, and that all might have done so if they had thought fit; and they insisted that such occupation as *William* ever had, must be referred to his rights as tenant in common with the other children, and that in that character he had not become liable to any rent. Now, the effect of the Master's first report, as I understand it, is, that the Master has not charged *William* with any rent during one period, because he was then engaged in the affairs of the whole family; that he has not charged him with any rent during the intervals of his absence from the island;

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v.
BURCHELL.
—
Judgment.

and that he has charged him with a proportionate part of the rent only for those periods during which other members of the family resided in the Lower house as well as himself, as suggested by the answer, charging those other members with rent also. [His Honor then stated the exceptions which had been taken, and the decision of the Court thereupon.] It did not at first appear, by the Master's first report, in what character he had considered *William* as occupying the Lower house, and I pointed out what appeared to me to be the inconsistency of the finding. If he considered *William* in the light of an ordinary lessee of the entire property, why should he be excused from paying rent, when, for his own purposes, he was occasionally absent from the island? And why, if the Plaintiff had to pay rent as lessee, should he be excused from paying rent during the time that the other members of the family visited him; and I concluded that such occupation as the Master found *William* to have had, was not inconsistent with the character of a tenant in common. I was of opinion upon the case in evidence before the Master, whatever the grounds might be on which the Master's opinion was founded, that the Plaintiff, *William*, was entitled to be considered as tenant in common, occupying the Lower house under that title, admitting some, and not excluding any other members of the family from residing there if they thought fit; and that, in that character, he was not chargeable to them in respect of his occupation of the Lower house. I remain of the same opinion now. I do not state what my opinion might have been if *William* had been a mere stranger; but he was not a stranger: his position as tenant in common was sufficient to explain his occupation, without either trespass or contract. The Defendants, however, under the order of 1843, succeeded in persuading the Master to charge the Plaintiff as an occupying tenant;

and the Plaintiffs, from not excepting to that report, precluded me from investigating the truth of the case, or from disturbing the Master's finding. The correctness of that part of the case cannot therefore now be looked into.

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 v.
 BURCHELL.
 Judgment.

No exceptions have been taken to the last report. The further directions were, therefore, plainly a matter of course. The Defendants, however, have attempted in argument to open the whole case, alleging as their excuse, first, that there was inconsistency, and therefore error, apparent on the report, in treating the Plaintiff as occupying the Lower house in different characters during different periods; and secondly, that I had erroneously supposed the Master to have treated him as tenant in common. I do not think there is any such error apparent in the report; nor did my former decision proceed upon any hypothesis, but upon my own judgment of the case and evidence then before me. I should come to the same conclusion now. Even if I thought the case was one in which the later proceedings ought to be opened, in justice to the Plaintiff I could not do otherwise than open all that has been done from the month of June, 1843. I could not hold him bound if I opened the proceedings in the way desired by the Defendant. From nothing which is now before me, can I see any ground for changing the opinion I had come to before. The Plaintiffs are entitled to a decree for the payment of their legacies.

I observe, by the report of this case on the original hearing, that I am apparently reported to have said, that a legacy to a wife could not be set off against the debt of the husband (*a*). I wish that inaccuracy to be

Where a debt to the estate of a testator may be set off by the executors, against a legacy bequeathed by

the testator to the debtor, such debt may also be set off against a legacy bequeathed by the testator to the wife of the debtor, subject to her equity (if any) in the legacy.

(*a*) See 3 Hare, 99, and marginal note, *Id.* 97. And see *Hall v. Hill*, 1 Dr. & Wa. 109, per Sir Edw. Sugden.

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 v.
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corrected. My meaning must have been, that there could be no such set-off in this case to the prejudice of the wife's equity (if any) to a settlement.

22nd Dec.

1847.

11th Jan.

A bequest of property to be at the disposal of the testator's wife, for herself and children, does not give the widow a power of appointment, or make the widow and children tenants in common, but creates a joint tenancy.

Argument.

CROCKETT v. CROCKETT.

THIS case is reported on the hearing for further directions, in 1 Hare, 452 (a). One of the children of the testator, *John Crockett*, attained his age of twenty-one, and presented his petition praying for the payment to him of his share of the testator's estate.

Mr. *Goldsmid* for the Petitioner; and

Mr. *Romilly* and Mr. *Roundell Palmer*, for the infant children of the testator.—The direction that the property shall be “at the disposal” of the wife, must be construed not as giving her a right of “distribution” or appointment, but only a power of “disposition,” in the sense in which a personal representative of the testator possesses that power. The will does not give an interest for life to the widow, and an interest in remainder to the children. The only other construction is that which would make the widow and children joint-tenants. *Crooke v. De Vandes* (b); *Oates v. Jackson* (c); *De Witte v. De Witte* (d); *Bridge v. Yates* (e); *Beales v. Crisford* (f).

(a) The words of the gift were “for herself and children,” not “for herself and *her* children,” as stated in the former report. It does not seem in this case very material.

(b) 11 Ves. 330.

(c) 2 Strange, 1172.

(d) 11 Sim. 41.

(e) 12 Sim. 645.

(f) 13 Sim. 592.

Mr. *Walker* and Mr. *Bush*, for the widow; and

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v.
CROCKETT.
—
Argument.

Mr. *Leach*, for the trustees of a settlement made on the second marriage of the widow.—If the will confers upon the children only a right of maintenance, it can be shewn that the petitioner is amply provided for: *Longmore v. Elcum* (a), *Bateman v. Foster* (b). If the interest of the children does not depend on the right to maintenance, the question is, whether it is not subject to the appointment of the wife amongst them; or, if not, whether the widow and children are not tenants in common. The language of the will is susceptible of either of the latter constructions: *Casterton v. Sutherland* (c), *Doe d. Gill v. Pearson* (d), *Tomlinson v. Dighton* (e), *Fowler v. Hunter* (f).

VICE-CHANCELLOR:—

Judgment.

At the hearing of this cause, it was contended, for the widow, that she took the whole property absolutely. The argument was, that the whole was given to her the better to enable her to support herself and children, and not upon trust for herself and her children. Upon the authorities then referred to, although it would not, perhaps, be very easy to explain all the cases, I was of opinion, (as in *Raikes v. Ward* (g)), that the children took an interest in possession; and in order that the parties might, if they thought fit, get my opinion corrected on appeal, I made a declaration to that effect in the decree, directing also, according to the form of some modern orders, that the whole income should be paid to the widow during the infancy of the children, or until

(a) 2 Y. & C. C. C. 363.

(b) 1 Coll. 126.

(c) 9 Ves. 445.

(d) 6 East, 173.

(e) 1 P. Wms. 151.

(f) 3 Y. & J. 506.

(g) 1 Hare, 445.

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—
Judgment.

further order, she maintaining and educating the children in a proper manner, with liberty for the widow and children to apply. That decree has been acquiesced in. One of the children has now attained his majority, and has applied to have an aliquot part of the fund paid to him, upon the principle contended for, that the widow and surviving children are joint tenants under the will. This claim is resisted by the widow, who has contended, that the will gives her an exclusive power of appointment of the fund amongst the children, in such shares and proportions, manner and form, as she may think fit. That construction, if admitted, would deprive the children of the interest which the decree gives them; and if it be the true construction of the will, the benefit of it must be obtained by appealing from the decree.

The construction contended for on the part of the children was, that the will creates a joint tenancy. Attending to the legal consequences of that construction of the will, I am satisfied it will not do what the testator intended. If I were at liberty to modify the words of this will by conjecture, I should perhaps have little difficulty in doing so in a manner not far from what the testator probably did intend; but as the words of the will do not enable me to confine the widow to a mere life estate, and as the decree gives the children a present interest, a joint tenancy appears to me to be the necessary conclusion.

Minute.

DIRECT that the share of the Petitioner be paid to him; and continue the former order, as to the widow and the infant children. Costs to be paid out of the fund.

1846.

FREEMAN v. TATHAM.

20th & 24th
March.
6th May.

SARAH FREEMAN, for many years a servant of Mr. *Tatham*, of *Sion College*, in the city of *London*, had saved a considerable sum of money, which she invested in the Three and a Half per Cents. Mr. *Tatham* died in December, 1830. In February, 1831, *Sarah Freeman* transferred the stock standing in her name, amounting to 475*l.* 15*s.* 3*d.*, into the joint names of herself and *Martha Tatham*, the daughter of her deceased master. The dividends were received by *Sarah Freeman* from time to time so long as she lived, and she also made several additions to the stock, which at the time of her death amounted to 637*l.* 10*s.* 3*d.* *Sarah Freeman* died in May, 1839, intestate.

A. transferred a sum of stock into the joint names of herself and *B.*, and then informed *B.* of the transfer, expressing her confidence that *B.* would fulfil the wishes which *A.* might express to her respecting the same. After the death of *A.*, her administratrix filed the bill against *B.* for the transfer of the stock as part of the personal estate of *A.* *B.*, by her answer, admitted the transfer of the stock into the joint names of *A.* and *B.*, and stated that *A.* afterwards, from time to time, told her (*B.*) what part

In the month of August, 1839, *Martha Tatham* transferred 350*l.* of the stock into the joint names of herself and three other persons, upon trust to pay the dividends to *Susan Freeman*, a sister of *Sarah Freeman*, for her life, and after her decease, upon trust for *Martha Tatham*, her executors, administrators, and assigns.

of the stock and dividends should be transferred and paid to different persons, and subject to such dispositions desired her to hold the remainder for her own use; and *B.* also, by her answer, stated that she had, in pursuance of such directions, paid the several sums to the persons mentioned:—*Held*, that the Plaintiff, having read from the answer the admission of the transfer upon trust, was bound also to read, from the answer, the directions or declarations of *A.* as to the trusts upon which the fund was to be held and disposed of.

That the Plaintiff ought not, in the circumstances of the case, to be allowed to withdraw that part of the answer which had been read.

That, as to *B.*'s statement of the declaration of *A.*, that the residue should belong to *B.* herself, the Court would direct an issue, giving the Plaintiff an opportunity of examining *B.* thereon, as to the directions given to her by *A.*

That the plaintiff was not bound to read the statement in the answer as to the fact of the payments to the other persons having been made; and that *B.* was bound to prove, by other evidence, the payments which she had made in pursuance of the trusts.

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 —
Statement.

Susan Freeman, the sister, received the dividends on this 350*l.* stock up to the month of January, 1844.

Susan Freeman afterwards filed her bill, as administratrix of *Sarah Freeman*, the intestate, against *Martha Tatham* and the three trustees of the 350*l.* stock, praying that an account might be taken of the stock which had been transferred into the joint names of the intestate and of the Defendant, *Martha Tatham*, and also an account of the dividends accrued since her death; and that the 350*l.* stock, and the residue of the 637*l.* 10*s.* 3*d.* stock, and the said dividends, might be transferred and paid to the Plaintiff; or, if the Plaintiff should not be entitled to such relief, that the trusts of the 350*l.* stock might be carried into execution under the direction of the Court.

The answers admitted the facts as stated above. The Defendant, *Martha Tatham*, under the circumstances stated in the answer, and subject to the life interest of the Plaintiff, in 300*l.* of the stock, (which the Defendant stated that she had, as a matter of bounty, increased to 350*l.*), and also subject to certain payments made thereout, claimed to be entitled to the stock absolutely. At the hearing of the cause,

Admission. Mr. *Wood* and Mr. *Prior*, for the Plaintiff, read, as evidence in the cause, the admission in the answer of *Martha Tatham*, that *Sarah Freeman*, the intestate, in the month of February, 1831, informed the Defendant that she had, with the assistance of *W. H. Tatham*, a brother of the Defendant, who had been a clerk in the Bank of *England*, made the transfer of the 475*l.* 15*s.* 3*d.* stock into the joint names of herself and the Defendant, and that she intended to add thereto her future savings;

and that *Sarah Freeman* repeatedly stated to the Defendant, that her desire and intention was, that, after her death, the Defendant, if she survived, should have the absolute benefit of the stock which should be standing in the joint names of the Defendant and *Sarah Freeman* at the death of the latter; at the same time expressing her confidence that the Defendant would fulfil every wish that she (*Sarah Freeman*) might give to the Defendant respecting the same.

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Admission.

Mr. Romilly and Mr. Nevinson, for the Defendant, *Martha Tatham*, insisted that, in continuation of the foregoing admission of the fact of the transfer of the stock into the name of the Defendant, *Martha Tatham*, they were entitled also to read from her answer the following statement of the trusts which the intestate had declared of the stock so transferred.

Argument.

"And this Defendant saith, that the wishes and directions which the said *Sarah Freeman* from time to time gave and repeated to the Defendant respecting such Bank Annuities, were, that the Defendant, in the event of her surviving the said *Sarah Freeman*, should, during the life of her, the said *Sarah Freeman's* sister (the Plaintiff), pay to her (the Plaintiff) the dividends of 300*l.*, part of the Bank Annuities, which should, at the death of the said *Sarah Freeman*, be standing in the joint names of herself and the Defendant; or if the conduct of the Plaintiff should be such as, in the opinion of the Defendant, to render it prudent not to trust her with money, then that the Defendant should, instead of paying such last-mentioned dividends to the Plaintiff, apply the amount thereof for her (the Plaintiff's) benefit during her life, and that the Defendant should pay unto her, the said *Sarah Freeman's*, friend, Mrs. *Amelia*

Answer.

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 —
 Answer.

Palmer, the wife of *John Palmer*, of *Little Moorfields*, in the city of *London*, shoemaker,—to whom the said *Sarah Freeman* expressed herself to be under great obligations for having provided her with a home, when she, the said *Sarah Freeman*, first came to *London*, until she got into service,—the sum of 50*l.*; and to the said *John Palmer*, 20*l.*; and to their three children, *John Palmer*, jun., *Amelia Palmer*, and *Martha Maria Palmer*, the sum of 5*l.* each; and to her, the said *Sarah Freeman's*, niece, *Sarah Shanks*, of *Halston, Norfolk*, daughter of her eldest sister, who was residing at the same place, the sum of 10*l.*; and to *George Leader*, the brother-in-law of the said *Sarah Freeman*, the sum of 5*l.*; and the sum of 25*l.* to be divided between *William Henry Tatham*, and his four children, *Richard*, *Charles*, *Henry*, and *Mary*; and that, subject to the payment or application of such dividends of the said sum of 300*l.* to or for the benefit of the said Plaintiff during her life, and to the payment of such sums of money as before mentioned, all the Bank Annuities, which, at the death of the said *Sarah Freeman*, should be standing in the joint names of the said *Sarah Freeman* and the Defendant, should belong absolutely to the Defendant. And the Defendant saith, that she frequently requested the said *Sarah Freeman* to have put into writing the wishes and directions she had expressed to the Defendant respecting the said Bank Annuities, but that the said *Sarah Freeman* always refused to have the same done, expressing her entire confidence in the Defendant, and that the Defendant would comply with her wishes respecting the same."

Argument.

The Counsel for the Defendant contended, that the Plaintiff was bound to take the statement in the answer as she found it, and that she could not select merely so much of the answer as would shew that a trust existed,

and avoid reading the statement of the particulars for which the trust was created. The question was, whether one passage qualified the other: it did not depend on the existence of a grammatical connexion between the passages; *Bartlett v. Gillard* (a), *Davis v. Spurling* (b); nor did the absence of any grammatical connexion prevent the Court from admitting one passage to qualify the other: *Rude v. Whitchurch* (c), *Nurse v. Bunn* (d).

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Mr. Wood, for the Plaintiff.—The Plaintiff may read from the answer the admission of the fact of the transfer having been made, without reading the statement which the Defendant gives of the purposes of that transfer. It is not stated that the alleged declaration of trust took place at the same time as the transfer. The transfer was, therefore, a transaction complete in itself; and the effect of that transfer was to charge the Defendant as trustee of the stock: *Thompson v. Lambe* (e), *Taylor v. Salmon* (f). The statement may perhaps be used by the Defendant as a ground for asking an inquiry; *Miller v. Gow* (g), *Connop v. Hayward* (h); but the Plaintiff is not therefore bound to adopt it as evidence.

[The question of the right of the Defendant to read from the answer the passage referred to, was reserved.]

Mr. Wood and Mr. Prior, for the Plaintiff.—The transfer of the stock into the name of the Defendant, *Martha Tatham*, without any proof that it was meant as a gift to her, created a trust for *Sarah Freeman*, even

(a) 3 Russ. 156.

(b) 1 Russ. & Myl. 68.

(c) 3 Sim. 562.

(d) 5 Sim. 225.

(e) 7 Ves. 587. See *Inge v.*

Kenny, 4 Hare, 452.

(f) 3 Myl. & Cr. 422.

(g) 1 Y. & C. C. C. 56.

(h) Id. 33.

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without any such admission as exists in this case, that the transfer was expressly upon trust. *Rider v. Kidder* (a). The distinction is, whether the purchase or transfer of stock is made by the party in the name of a wife or child, for whom it is natural that he should make a provision, *Dummer v. Pitcher* (b), *Kilpin v. Kilpin* (c); or, as in this case, into the name of a stranger standing in no such relation. The trust then clearly arises.

Mr. Romilly and Mr. Nevins, for the Defendant, *Martha Tatham*.—If a party purchases stock, or purchases an estate, in the name of another person, towards whom he does not stand in that special relation in which a gift or advancement may be presumed, a resulting trust arises in law for the benefit of the party who has advanced the money: but if a party, having stock or property standing in his own name, transfers or conveys it to such other person, the resulting trust does not arise: it then becomes a voluntary gift, transfer, or conveyance. If every transfer of stock or other property from one to another, without consideration, created a trust for the transferor, there would be no cases founded upon the effect of voluntary conveyances. The equitable interest in all such cases would remain in the donor notwithstanding the transfer. Thus, in *Rider v. Kidder*, Lord Eldon reasons throughout on the case of the purchase of stock, or of an annuity, in the name of another person, and not on the case of a mere transfer or assignment. Even if the presumption were in favour of the trust, that presumption may be rebutted by very slight circumstances: *George v. Howard* (d). In this case there are, first, the Defendant's statement of the paid declaration of trust; secondly, the actual disposition of the fund by the Defendant in conformity with that

(a) 10 Ves. 360.

(b) 2 Myl. & K. 262.

(c) 1 Myl. & K. 520.

(d) 7 Price, 646.

declaration; and, thirdly, the acquiescence of the Plaintiff for several years in that disposition, without proof of any information having reached her which she did not know immediately after the death of the intestate.

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Argument.

Mr. Piggott, for the Defendants, the three other trustees of the 350*l.* stock.

Mr. Wood, in reply.—The evidence which the Plaintiff has read from the answer proves nothing more than the transfer of the fund by *Sarah Freeman* to the Defendant, *Martha Tatham*. It was not thought that the Plaintiff could be required to read the other passages, which appear in a different part of the answer, and relate to circumstances said to have taken place at different times subsequently to the transfer of the stock. If, therefore, the Court should hold these passages to be inseparably connected with each other, it is a surprise on the Plaintiff,—and the Court will permit him to withdraw that part of the answer which he has read with regard to the transfer.

VICE-CHANCELLOR, at the close of the argument, said:—

March 24th.
—
Judgment.

I will not finally dispose of this case until I have read the answer in private. The question in the cause is, whether the Defendant is a trustee or absolute owner of the stock which is the subject of the suit. The Defendant, by her answer, says, that she accepted the trust; and the trust was, to hold the stock for such purposes as *Sarah Freeman* should thereafter declare. Though *Sarah Freeman* did not at first declare the trust, but was to declare it from time to time, yet the trust is one subject and one transaction. If

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these passages had been found in any other paper than an answer, there could have been no question but that they must have been taken together. If the Plaintiff seeks to charge the Defendant as a trustee, by the Defendant's admission that she is a trustee, I cannot but think the Defendant must have a right to insist that the Plaintiff shall also read what the trusts are. It is another question whether the Defendant can compel the Plaintiff to read the statement that she (Defendant) has applied the fund in pursuance of the trusts.

If the Plaintiff charges the Defendant with the possession of the stock, and it is only by the answer that the Plaintiff does so, it seems inconsistent with justice that the Defendant should not be allowed to explain the circumstances under which that possession was obtained. The stock was transferred into the name of *Martha Tatham* without her knowledge. She did not know of the transfer until the deceased informed her of it, and told her she had transferred the stock into their joint names "in the confidence that the Defendant would fulfil every wish and direction which she might give respecting the same." It may be taken as clear that *Sarah Freeman* might have called for a transfer back the next moment; and that if *Martha* had died first, her executors could not have claimed it as a trust created for her benefit. The Plaintiff calls upon the Defendant in this suit for an admission of the facts, and the Defendant says, "I did not know of the transfer until the 15th of February, when *Sarah Freeman* told me she had transferred the stock upon certain trusts, and I accepted the trusts." The Plaintiff therefore gets no admission of the possession of the stock, except in connexion with the trusts and gives no independent evidence of the transfer.

If in this case the Plaintiff had proved the transfer of

the stock into the names of the Defendant and the intestate, the case of *Rider v. Kidder* (a), would be an authority that such a transfer would have created a trust. I do not understand the distinction attempted to be drawn between a transfer and a purchase. In that case a party purchased stock in his own name, and afterwards transferred it into the joint names of himself and a female with whom he cohabited. Lord *Eldon* said, it was a trust by implication. In the case of a child or wife, a gift might have been presumed; but not in the case before him. He speaks of stock paid for by the party from whom it proceeds, but the reasoning did not depend upon that circumstance. The question was, whether a party into whose name, jointly with another person, stock had been transferred, could have insisted upon the stock being his property.

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 —
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The Counsel for the Plaintiff have, however, in the reply, applied for leave to withdraw that part of the answer which they had read, if I should be of opinion that more must be read than they proposed to read. And where a Plaintiff, intending to read one part of an answer, appears to have been surprised by being compelled to read a further passage, the Court usually allows him to withdraw the passage which he had proposed to read. But I do not consider this a matter of right, where the case is gone into, and the cause heard upon the supposition that the Court may decide that the further passage must be read; it is in the discretion of the Court. If I allow the passage read from the answer (including that which the Defendant relies upon) to be withdrawn, the consequence might be, that the Plaintiff would get the whole of this stock, though not entitled to it; for if I send the case to an inquiry, every-

(a) 10 Ves. 360.

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thing will, of necessity, so far as the trust declared by *S. Freeman* is concerned, turn upon the evidence of *Martha Tatham*; and if, as it is said, *Martha Tatham* cannot be received as a witness, I may be compelled to charge her over again with the money which she has paid away. If *Sarah Freeman* had never told the Defendant of the transfer, and the Defendant had found the stock standing in her name, the fund would have been now entire; but the Defendant being informed by *Sarah Freeman* of the transfer, and being told how she was to dispose of the fund, has, in pursuance of such instructions, since *Sarah Freeman's* death, paid away a considerable part, and invested the remainder in the names of certain trustees. Another consideration is this: the Defendant says that she is a trustee. Under the common rule, if she be a trustee for other persons, such other persons ought to have been made parties to the suit; and if they had been made parties to the suit, it is by no means improbable that *Martha Tatham* would have disclaimed all interest in the fund rather than have to pay these sums over again. She might then have been examined as a witness for the other parties. If I allow the Plaintiff to withdraw the admission which has been read from the answer, and send the case to an issue, I should have great difficulty in ordering the Defendant to be examined as a witness, for she would then be a witness for herself; but if I hold the Plaintiff to the answer which has been read, I may give the Plaintiff an opportunity of examining the Defendant, to see if her credit can be shaken before a jury.

May 6th.

VICE-CHANCELLOR.—It was argued on behalf of the Plaintiff in this case, that the Defendant, having survived *Sarah Freeman*, was a trustee of the stock for her estate; and that there was nothing to prove that the

Defendant was authorized by *Sarah Freeman* to distribute any part of it. The Plaintiff proceeded to read a passage from the answer of the Defendant, contending that such passage contained an admission of the trust of the stock from the moment of the transfer. That passage having been read by the Plaintiff, it was argued by the Defendant's Counsel that the Plaintiff was bound to read the other part of the answer which describes the trusts. The Plaintiff does not deny that the Defendant would have a right to have read the other part of the answer by which the trusts are set out, if the declaration of the trusts had been contemporaneous with the transfer. It is admitted then, that, if the transaction were one, the Plaintiff could not have read from the answer the admission of the one without reading the admission of the other; but the effect of the answer being, that the transfer of the stock was at one time, and the declarations of trust were made subsequently from time to time, it was contended that the Plaintiff might read from the answer the admission of the trust, without thereby entitling the Defendant to read therefrom the statement of its nature. It is alleged by the answer of *Martha Tatham*, that she has paid all the sums which she states that *Sarah Freeman* directed her to pay; and if the trusts were proved, which she states to have been so declared, and the payments proved to have been made, *Martha Tatham* would be discharged to that extent.

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Two points were raised in argument: first, the right of the Defendant to require the Plaintiff to read the declarations of trust; and, secondly, supposing I was of opinion that the Defendant had a right to require the Plaintiff to read the whole, then the Plaintiff's Counsel claimed a right to withdraw that part of the answer which he had read, and to rest his case upon the general

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reasoning arising out of the facts; and upon that point the question is, whether I ought to allow the Plaintiff's Counsel to withdraw what he has read.

The argument in support of the Plaintiff's right to read the admission of a trust simply, was drawn from a supposed analogy to the cases in which it is decided, that where an executor admits the receipt of money, and seeks to discharge himself by a payment out of it, there the Plaintiff may read the admission of the receipt, without being compellable to read that part of the answer which states that the executor has applied it in a particular manner, or in a due course of administration,—subject to this observation, that, if the executor states that he received it and paid it away at the same time, so as to make the receipt and the payment parts of the same transaction, there the Court will not charge him; but if he states that he received it on one day, and paid it away on another, the Plaintiff may read the admission of the charge, without reading the subsequent statement as to the discharge. In this case my opinion is in favour of the Defendant's right to require the Plaintiff to read the whole if she reads any part of the admission. The Plaintiff cannot stand in a better position than that in which *Sarah Freeman* herself would have stood. *Sarah Freeman* transferred the stock into the joint names of herself and the Defendant, without the Defendant's knowledge. The Defendant, when she was informed of it, might have refused to be a trustee, but she consented to hold the stock upon such trusts as *Sarah Freeman* should from time to time declare. Suppose *Sarah Freeman* to be living, and to be seeking by this suit to charge the Defendant as trustee of the stock,—could she have insisted upon her right to read the answer of *Martha Tatham* admitting that she was a trustee, without reading that part which stated

what the trusts were upon which she was to hold it, if *Martha Tatham* had stated by her answer that, after being informed of the transfer, she had, and could prove that she had, applied part of the money in conformity with the trusts? Could *Sarah Freeman*, in such a case, have charged *Martha Tatham* as a trustee, without allowing her to state what the trusts were? The question is not whether *Martha Tatham* could claim the right to have her answer read to prove that she had made the payments,—she might be bound to prove the fact of payment,—but, supposing that proved aliunde, whether she would not have a right to insist that the whole answer should be read, to shew that the payments were made in conformity with the trusts. I think she would have had that right. The subsequent declarations are in fact part of the original transaction. The acceptance was of a trust to be from time to time declared; and the authorities cited, with reference to the doctrine of charge and discharge, do not appear to me to be analogous. It appears to me, that, having accepted the trusts of the transfer, the subsequent declarations were part of the trusts which she accepted, and the author of the trust could not fix her by her own admission without allowing her to explain what those trusts were.

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The question then arises, whether I should allow the Plaintiff to withdraw the passages read as evidence from the answer. That is entirely discretionary in the Court. The Defendant must, as I assume, prove that she has paid various sums of money in conformity with that trust, which I also assume to have been proved. If I allow the answer to be withdrawn, the consequence will be, that the Defendant must depend upon the liberality of the Plaintiff to escape being charged with the whole of the sums which she has paid, though in fact she has

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done that which *Sarah Freeman* required her to do. Nothing could be more unjust than this result, if the trusts are such as *Martha Tatham* says they were.

The cause now stands in this position: I am not bound to give implicit credit to *Martha Tatham's* statement; and the course which I suggested at the close of the argument, I feel myself at liberty to take, though I am aware, that, in seeking to arrive at the truth, the subject matter of the trust may unhappily, to a great extent, be sacrificed. Until the case of *Milner v. Singleton*, I never supposed that the Court of Chancery (I do not allude to what may have been done in bankruptcy) allowed a party to be examined as a witness for himself. But that is not this case. If the Defendant has by her own oath entitled herself to a sum of money, it is quite another question whether I may not direct an issue to see whether a jury will give credit to what she says by her answer. That question may be tried by directing an issue in the words of the answer,—whether *Sarah Freeman* declared her will to be, that such part of the stock as at her death should be standing in the joint names of herself and the Defendant, should, at the death of *Sarah Freeman*, belong absolutely to the Defendant, subject to the payment of the several sums mentioned in the answer, *Martha Tatham* consenting to be examined as to the directions given to her by *Sarah Freeman*.

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THE suit was for the execution of the trusts of the will of *William East*, and to charge his surviving executor, *Thomas East*, with breaches of trust, and, among other things, with default in omitting to get in a sum of 400*l.* owing from *James East*, upon his promissory note,—a sum of 1150*l.* also owing from *James East* upon his bond,—and a sum of 1000*l.* owing from *John East* by bond, and further secured by a warrant of attorney.

The testator died in May, 1825, during the infancy of the Plaintiff, his son and sole residuary devisee and legatee. The Plaintiff attained his age of twenty-one in May, 1832, and was then let into possession of the real estate. The Defendant *Thomas East*, and *James East*, were the trustees and executors of the will. The bill was filed in 1842. *James East* died insolvent shortly after the institution of the suit.

At the hearing, besides the usual decree for an account, the Master was directed to inquire whether any and what debts were due to the testator at the time of his death from *James East* and *John East*, and whether any and what steps were taken to get in the same, and under what circumstances the said debts were left outstanding, and how far the same or either of them were left outstanding with the privity or consent of the Plaintiff; such inquiries to be without prejudice to any question in the cause.

The Master reported as follows:—"I find that, at the death of the testator, the sum of 400*l.*, secured by

20th, 21st,
23rd, & 29th
April.

On an inquiry before the Master, the Plaintiff read from the answer and examination of the Defendant, the executor, an admission that a promissory note for 400*l.*, belonging to the testator, had come to the hands of the executor shortly after the testator's death; and the executor was then allowed to read the further statement, that some years afterwards, when the Plaintiff (the sole residuary legatee) came of age, he had delivered the note to the Plaintiff, who thanked him for taking care of it.

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the promissory note of the late Defendant, *James East*, was due to the testator from the said *James East*; and that no steps were taken to get in the same; but no evidence hath been laid before me to shew how far the same was left outstanding with the privity or consent of the Plaintiff, nor under what circumstances the said debt was left outstanding, except that I find that the Plaintiff was a minor from the death of the said testator up to the 24th day of May, 1832, when he attained the age of twenty-one years. And I find that the Plaintiff exhibited interrogatories for the examination of the Defendant, which were allowed by me, and that the said Defendant put in his examination thereto. And I find that the said Plaintiff hath produced before me the said examination, and that he hath read part of the said examination, that is to say, from the commencement of the examination to the fourth interrogatory, down to the words 'no such entry to make (a).' And the said

(a) "This examinant saith, that he first became aware of the existence of the bill of exchange or promissory note for 400*l.* in his original answer mentioned, and became possessed thereof by finding the same in a drawer of the said testator's bureau shortly after his decease." "And he saith, that he never kept, or caused to be kept, any book or books of account or accounts relating to the estate of the said testator, except the book of account or cash-book hereinbefore mentioned in the answer to the second interrogatory, and a certain other book of account, called the 'Labour Book,' being an account of the examinant's payments for labour, and other

matters, relating to the said farm. And he saith, that he did never make or cause to be made any entry in such book or books of account or accounts respecting the said bill or promissory note for 400*l.*, because, as he never received any payment in respect thereof, there was no such entry to make." "And he saith, that he did not, when he gave the said bill or promissory note for 400*l.* to the Plaintiff, receive or take from him any receipt or acknowledgment in respect thereof, but the Plaintiff thanked him for taking care of the same; and this examinant took no such receipt or acknowledgment from the said Plaintiff, because, considering the friendly terms upon

Defendant hath insisted upon his right to read so much of his examination to the fourth interrogatory, which relates to the said note, which I have allowed him to do. And I find, upon reading that part of the said examination which has been read by the said Plaintiff, that the Defendant thereby describes the said note as being in his original answer mentioned. And I have looked at the said answer, and find that only one promissory note for 400*l.* is therein mentioned; and I have read the passage in the original answer between fols. 26 and 28(*a*). And I find upon reading the said examination and the original answer respectively as before mentioned, and also upon reading the said examination alone, without reference to the said original answer, that the said Defendant first became aware of the existence of the said bill of exchange or promissory note for 400*l.*, and became possessed thereof, by finding the same in a drawer in the said testator's bureau shortly after his decease; that he made no entry thereof in any book of account; that, upon the said Plaintiff coming of age, he handed him the said bill of exchange or promissory note; that he did not, when he gave the said bill or promissory note to the Plaintiff, receive or take any receipt or acknowledgment in respect thereof, but the Plaintiff thanked him for taking care of the same; and that the Defendant took no receipt or acknowledgment from the Plaintiff, for the reasons in his said examination men-

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which they then were, and that all accounts relating to the said testator's estate were settled between them to the Plaintiff's satisfaction, and that this examinant having no reason to doubt the Plaintiff's good faith and honour, it never occurred to him to be necessary to ask for any such receipt or acknowledgment; nor did he then receive

or make any entry or memorandum in respect of the said bill or promissory note."

(*a*) The answer stated, that when the Plaintiff attained his age of twenty-one years, the Defendant handed to the Plaintiff a certain promissory note for 400*l.* from the said *James East, &c.*

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tioned. And I find that the said *James East* was also, at the time of the decease of the said testator, indebted to the said testator in the sum of 1150*L*, secured by a certain bond or obligation, bearing date the 15th of December, 1821, and payable with interest at 5*L* per cent. per annum, which said sum of 1150*L*, with a large arrear of interest thereon, is still due and unpaid; that no steps were taken to get in the same; but no evidence hath been laid before me to shew how far the same was left outstanding with the privity or consent of the Plaintiff, nor under what circumstances the said debt was left outstanding, except that I find that the Plaintiff was a minor until the time aforesaid. And I find that there was also due and owing to the said testator at the time of his death, from *John East*, another brother of the said testator, upon or by virtue of a certain warrant of attorney to confess judgment under the hand and seal of the said *John East*, and bearing date the 6th of April, 1820, the sum of 1000*L* and interest at the rate of 5*L* per cent. per annum, which said sum of 1000*L*, with a large arrear of interest, is still due and unpaid; that no steps were taken to get in the same; but no evidence hath been laid before me to shew how far the same was left outstanding with the privity or consent of the Plaintiff, nor under what circumstances the said debt was left outstanding, except that I find that the Plaintiff was a minor until the time aforesaid."

No exceptions were taken, and the cause came on for further directions.

Argument.

Mr. *Romilly* and Mr. *C. R. M. Jackson*, for the Plaintiff.—The Plaintiff is entitled to read from the examination of the executor the admission that the promissory

note, part of the estate of the testator, came to his hands shortly after the testator's decease, without thereby admitting the subsequent statement, that seven years afterwards he handed the note over to the Plaintiff. A party may charge himself, but he is not allowed to discharge himself by his own answer, except in the single case in which he is stating one transaction composed of several circumstances which cannot be separated. It would be useless to obtain from an accounting party admissions of his receipts, if he were allowed to render them nugatory, by stating, on the opposite side of the account, an equal amount of payments, to be taken as equally conclusive in his favour: *Robinson v. Scotney (a)*, *Thompson v. Lambe (b)*. The reasoning which applies to money applies also to securities for money. This is a question which is raised upon the face of the report, and it is, therefore, open to argument upon the report; and an exception in such a case is not necessary in order to enable the Plaintiff to contend, at the hearing for further directions, that the statement of the Defendant in discharge ought not to have been admitted. The Court would make it a subject of inquiry, whether any loss has happened to the estate of the testator from the omission of the Defendant to recover the sum due upon the note.

Mr. Beales, for the Defendant.

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Argument.

VICE-CHANCELLOR:—

The finding of the Master with regard to the promissory note, is not of a mere fact, leaving the result to the Court, but it is a conclusion from facts; and in such

thereupon he found certain facts. A party objecting to the admission of the evidence, and to the conclusion thereupon, cannot open that objection as appearing on the face of the report, without having taken exceptions.

Judgment.

The Master in his report stated, that he had admitted certain evidence, and that

(a) 19 Ves. 582.

(b) 7 Ves. 587.

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a case, I think, exceptions are necessary, if the finding of the Master is to be objected to. I am of opinion, however, that the Plaintiff, having read the admission of the Defendant, that the document came to his hands, the Defendant is entitled to read the statement which followed, shewing what he had done with it.

[His Honor then said, that the Defendant ought not to be charged with the 1150*l*.; and that an inquiry should be directed whether any, and, if any, what loss had resulted to the estate of the testator by reason of the executors or either of them not having enforced payment of the debt of 1000*l*., with liberty to the Defendant to take such proceedings as he might be advised to get in the same.]

An executor having possessed a promissory note for 400*l*. part of the assets of the testator, retained the note in his possession, without taking any proceedings to recover the amount or the interest for seven years; and at the end of seven years, when the sole residuary legatee came of age, the executor delivered the note to the residuary legatee. The residuary legatee ten years afterwards filed his bill against the executor, charging him with breaches of trust in the administration of the estate. The Court, in such circumstances, refused to charge the executor with the amount of the promissory note, or direct an inquiry whether any loss had resulted to the estate by reason of the executor not having taken proceedings to enforce payment of the amount due on the note.

I have felt some doubt on the proper course to be taken with respect to the 400*l*. secured by the promissory note of *James East*. I am asked, as to this sum, to make a like inquiry to that which I have directed as to the 1000*l*. due from the same person. I am clear that such an inquiry cannot be directed without injustice to the Defendant, *Thomas East*. The two sums presented very different questions. Of the 1000*l*. due from *John*, I know nothing, except that *Thomas* had clearly been guilty of a breach of trust in not having called it in, supposing always that it was not adequately secured. The case respecting the 400*l*. is widely different. With respect to that sum, it is found by the Master, and the finding is not excepted to, that *James's* note was delivered to the Plaintiff on his attaining his majority, in May, 1832, and his attention called to the fact, that

bill against the executor, charging him with breaches of trust in the administration of the estate. The Court, in such circumstances, refused to charge the executor with the amount of the promissory note, or direct an inquiry whether any loss had resulted to the estate by reason of the executor not having taken proceedings to enforce payment of the amount due on the note.

it was unpaid; for the Master finds, that, when the promissory note was given to the Plaintiff by *Thomas*, the Plaintiff thanked him for the care he had taken of it; and from that time until after the death of *James*, in 1842, being a period of ten years, the Plaintiff retained the note in his possession without making any complaint, although no interest was paid upon it during that interval. In fact, he practically gave *James* time, without communicating to *Thomas* the fact that he was doing so. If, in such circumstances, any inquiries were to be directed, I could not, in justice to *Thomas*, do less than direct the two-fold inquiry, first, whether the 400*l.* might have been recovered from *James* during the period between May, 1826, (being one year after the testator's death), and May, 1832, when the Plaintiff attained his majority; and, secondly, whether, in effect, it might not have been gotten in wholly or in part during some portion of the ten years which elapsed after the Plaintiff attained his majority, and before the institution of this suit. Unless the first inquiry were answered in the affirmative, *Thomas* would not be liable; and if answered in the affirmative, *Thomas* would not be liable, unless the second inquiry should be answered in the negative. Supposing the first to be answered in the affirmative, and the second in the negative, it might then be argued that the Plaintiff had been damnified, and the question might arise, whether *Thomas* had not been damnified by the Plaintiff's delay during the ten years since his majority. It appears, however, from the evidence, that *James* had a life interest in the property worth 42*l.* a-year, charged with a capital sum of 200*l.*, and that he was in the receipt of the surplus income. His insolvency is, upon the evidence, confined to two years before his death; and the Plaintiff, upon whom the onus lay to prove that payment of the debt could not have been enforced since his majority, has gone into

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In such a case the executor would not be chargeable, unless it should be found that the amount of the note could have been recovered during the seven years between the death of the testator and the time when Plaintiff attained his majority; and if it were found that the amount could have been recovered during that time, still the executor would not be chargeable unless it should be found that the amount could not have been recovered during the ten years which elapsed after the note had been delivered to the Plaintiff.

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no evidence upon the subject, although the debtor was his near relation, and no interest has been paid during the whole period. If *Thomas* was to be held liable upon the note, he had a right to have the possession of it, and to make it available as he best could. In these circumstances, I think the Plaintiff has no right to ask me to subject *Thomas* to the possible consequences of inquiries which his own delay has made it impossible for *Thomas* to conduct, without disadvantage. I do not say how the case might have stood if the transaction had been recent, or if the Defendant, *Thomas East*, appeared to have been in a situation in which he could have derived any benefit from the breach of trust.

Minute.

DECLARE, that the Defendant, *Thomas East*, ought not to be charged with the 400*l.* and 1150*l.* Inquiry as to the 1000*l.* (See p. 348).

1847.

9th February.

HEMING v. SWINNERTON.

The submission to arbitration may, under the statute 9 & 10 Will. 3, c. 15, be made a rule of court, not only after the award has been made, but after the last day of the term following the publication of the award; and when, therefore, it is no longer open to either party to complain of the award on the ground of corruption or undue practice.

ON a notice of motion, on behalf of the Defendant, that a submission to arbitration of the matters in difference between the Plaintiff and the Defendant in this suit, and the award of arbitration, dated the 22nd of March, 1845, might be made a rule of Court,

Mr. *James Parker* and Mr. *Metcalf*, in support of the motion.—The case has been decided by the Lord

An objection to the validity of an award, apparent upon the award, is not an objection to making the submission a rule of court under the statute.

A motion to make a submission to arbitration a rule of court under the statute, may be made *ex parte*—*Semble*.

Chancellor to be within the statute 9 & 10 Will. 3, c. 15(a), and the present application is on the petty-bag side of the Court, and may be made without notice; but it has been thought proper to give notice of the motion on the authority of *Wilkinson v. Page*(b). In the case of *Hurry v. Chilton*(c), the order was made on a motion *ex parte*.

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[They confined the motion to that part of the notice, which asked that the *submission* might be made a rule of court.]

Mr. *Rolt* and Mr. *Wright*, for the Plaintiff, opposed the motion.—It is not material, for the present purpose, whether the Defendant was or was not compelled to give notice of his motion. Notice had been given, and the Plaintiff appeared; and as the Plaintiff might have moved to discharge the order, if it had been made, the Court would now hear the objections.

First, the application is too late. To make the award now a rule of court would be absolutely to preclude the Plaintiff from impeaching it upon any ground whatsoever. The second section of the statute enables the courts of law or equity to set aside the award only in cases where complaint is made "before the last day of the next term after such arbitration or umpirage made and published(d) to the parties." The time for complaint, therefore, has long since expired, and it has become impossible for the Plaintiff to procure the award to be set aside, however strong the reasons for setting it aside may be. This is there-

(a) See *Heming v. Swinnerton*, 2 Phillips, 79.

(b) 1 Hare, 280.

(c) M. R., 18 April, 1844.

(d) "Published," when the parties have notice that it is ready for delivery. *Muselbrook v. Dunkin*, 9 Bing. 606.

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fore an answer to the motion: *Spettigue v. Carpenter*(a). The decision in that case, that, after the award has been made, it is too late to move to confirm it under the statute, has been overruled by subsequent authorities; but to the extent that the award cannot be made a rule of court after the time for questioning it has passed, that case is still an authority. The party who seeks to enforce the award must apply to the Court whilst there is yet time for the other party to shew that the award is vicious.

[VICE-CHANCELLOR. — The Plaintiff might himself have applied to make the submission a rule of court, as a foundation for complaining of the award. Suppose the Defendant had applied for this order the last day of the term, after the award was made, the Plaintiff would then have had no opportunity of making his complaint within the time specified by the statute.]

The award was against the Plaintiff. It is not to be supposed that he should take steps to confirm it. If the application was made on the last day of the term, the Plaintiff might have had much difficulty in applying within the time; but if that be a difficulty to which the statute subjects him, he must submit to it. In this case, the Defendant desires to take a step which will bar the proceedings of the Plaintiff to set aside the award, where there is no statutory right to place the latter in such a position.

Secondly, it is an answer to the motion that the award is vicious. The Court will not give the force of its order to a bad award.

[Thirdly, the counsel for the Plaintiff proceeded to

(a) 3 P. Wms. 361.

shew that the award was vicious on the face of it; but the argument on this point was deferred, until the Court should have determined the first point, whether the time alone was an answer to the motion; and if not, the second point, whether, supposing the award to be bad, that fact would be an answer.]

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Mr. *James Parker*, in reply.—It must not be forgotten that the Court is sitting as a court of law, and the course of practice as to awards, under the statute, has received a settled construction. If a party objects to an award on any ground which does not appear on the face of the award, he must come within the time which the statute specifies. There is no difficulty in doing this. He may himself move to make the submission a rule of court, and, upon that being done, he may impeach the award; and this is his proper course, if he would secure to himself the power of complaining of the award within the time limited: *Davis v. Getty*(a). If he has not taken this course, that does not preclude the other party from moving, at any time, to have the submission made a rule of court: *Nichols v. Roe*(b). It is laid down in all the cases, that the submission may be made a rule of court after the award is made: *Fetherstone v. Cooper*(c), *Smith v. Symes*(d), *Chicot v. Lequesne*(e). All the books of practice lay down the rule in the same terms. If the rule had been subject to so important a qualification as that which is contended for,—that the award cannot be made a rule of court, when it is too late for either party to set it aside,—that qualification would be somewhere stated. If the objection to an award be on any ground which appears upon the award itself, it is an objection which may be raised, when the other party attempts to enforce it: *Watson, Awards*,

(a) 1 Sim. & St. 411, 414.

(b) 3 Myl. & K. 431, 442.

(c) 9 Ves. 67.

(d) 5 Madd. 74.

(e) 2 Ves. 315.

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p. 267, Ed. 2. Any defect may be shewn for cause against a rule for an attachment. It is not a writ which issues *ex debito justitiæ*; and the Court, when called upon to enforce the award, will hear any objections which appear on the face of it: *Auriol v. Smith* (a). All the defences of the Plaintiff, on the ground of the award being vicious, will therefore remain open to him after the submission is made a rule of court.

Judgment. VICE-CHANCELLOR:—

The question originally raised upon the construction of the statute was, whether the submission could be made a rule of court after the award had been made; and this, it was ultimately held, might be done. By this construction the whole stringency of the statute, with reference to the time of making the submission a rule of court, was got over. There is nothing upon the statute, which, after this construction, limits the time at which the submission may be confirmed. It is, however, contended that still it cannot be done at any time, but only at any time within the period allowed by the second clause of the statute, for objecting to the award, that it was procured by corruption or undue means. If the award is to be resisted on these grounds, it is competent to either party to have the submission made a rule of court, and then to make the complaint within the time limited by the statute. There is no inconsistency in the party taking this step for the purpose of impeaching the award: it is not the award, but the submission, which is made a rule of court. This concedes nothing. The party only affirms that he has given the arbitrator a power which he has abused; that is perfectly consistent with his application to set aside the award. It appears

(a) T. & R. 125.

to me, therefore, that the time which has elapsed is no objection to the order being made.

The case of *Wilkinson v. Page* (a) was in fact a motion to enforce the award, which was met by a cross motion to set it aside, and the case was gone into upon the objections apparent on the face of the award. I do not see any reason for a difference of practice on this subject in this court and the courts of law. All the objections which the Plaintiff may have to the award, and which he could now raise from the award itself, will be hereafter open to him, in answer to any steps which may be taken to carry the award into effect. They are no obstacle to making the submission (not the award) a rule of court.

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(a) 1 Hare, 276.

ATTORNEY-GENERAL v. JACKSON.

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9th, 10th,
11th, & 12th
March.
7th May.

THE Queen was seised of the greater part of the soil, mines, and minerals in and under the *Forest of Dean* and hundred of *St. Briavels*, in the county of *Gloucester*; and the free miners of the hundred of *St. Briavels*

Commissioners appointed under an act of Parliament, to set out the metes and bounds of mines and quar-

ries in the *Forest of Dean*, and to fix the rent to be paid for the same, held, under the terms of the act, to have no power to compel a miner to pay, in money, for by-gone working, or to exclude him from the award if he refused to make such payment.

Commissioners appointed by an act of Parliament, to determine the respective rights of the Crown and the customary miners on Crown lands, had made an award, giving a benefit to a miner, but had required such miner to submit to terms which they had no power to impose, and which the miner did not afterwards fulfil:—Held, that, after the time limited by the act for making the award had expired, the Court would not set aside the award at the suit of the Crown, as it could not then restore the miner to his rights under the act.

In the case of an award made upon the faith of a parol contract, entered into by a party taking a benefit under the award, that such party would pay a sum of money to the Crown, an information by the Crown seeking specific performance of the parol contract, and thereby, in effect, to add the parol agreement to the award,—cannot be sustained.

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claimed and exercised the privilege of opening mines and quarries in the unenclosed lands of the forest and hundred. The mines, quarries, and works, were held by the free miners under a form of license or grant, called a "gale," made by the officer of the Crown upon the application of the parties who had exercised the privilege of opening the works. The grants of gales ceased to be made by the Crown in April, 1832; but applications for other gales were subsequently made, and were, in some cases, acted upon, and mines opened accordingly, as if the grant had been obtained.

By the act 1 & 2 Vict. c. 43, for regulating the opening and working of mines and quarries in the forest and hundred, reciting, among other things, that it was expedient that due limits and boundaries should be assigned to such gales, pits, levels, and works, as had been, or might be, thereafter opened or made in the hundred, in order to the proper and effectual working of the same, three commissioners were appointed to carry the purposes of the act into execution. The 24th section of the act provided that the commissioners were to make their award in writing within three years from the passing of the act (a). The 27th section enacted that the commissioners should ascertain the particular circumstances of each gale, and of each pit, level, work, or quarry, and, by and in their said award, allot and set out to each gale, pit, &c., definite metes and bounds, and cause the same to be delineated in a plan, and such metes or bounds should form the boundary and extent of each such gale, pit, &c.; and in making such award of the metes and bounds, the commissioners should take into consideration, as far as the same could be ascertained, the first cost or purchase of each gale, pit,

(a) 27 July, 1838.

&c., or other interest or property, connected with the working of the said gales, pits, &c., or any license or permission in writing for engines, buildings, or machinery on the soil of the said forest, and also any other charge or expense incident to the possession or working of each gale, pit, &c., the depth of the pit, the extent of the level or work necessary for getting the coal or other mineral, the natures of the strata sunk or driven through, and the incidental expenses occasioned by the greater or less quantity of water in such works respectively, the number, thickness, quality, and facility of working the veins or beds of coal, or other mineral, &c., any peculiar facilities or difficulties which may have been experienced in the progress of working such gales, pits, &c., the past circumstances, profits, and advantages accruing from the working of the said gales, pits, &c., the present mode and expense of working the same, the area, extent, limits, metes, or bounds to which each gale, pit, &c., would be worked according to the probable operation of the present alleged mining customs, and any other circumstances which might appear to the commissioners as fit and proper to be considered by them, in order to enable them to come to a just and fair conclusion in the premises. The 39th section gave the commissioners power to award gales in cases where applications had been made for the same since 1832, and had been acted upon, if it should appear to the commissioners that such gales could be granted without injury to legally existing gales; and if not, either to declare such gales to be null and void, or to annex them to a previously existing gale or pit, and in the latter case, to award what compensation ought to be paid, and by and to whom in respect of such gale. The 51st and 52nd sections enacted, that, until the award, the existing share, rent, or other payments should continue to be receivable by, or payable to, the Queen

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and her heirs and successors, and all the powers for recovering the same should also continue in force.

The Defendant, in the year 1836, commenced working an iron-mine in the forest, called the *Old Sling Pit*, and he had, for about five years, raised minerals and ore therefrom, without making any payments to her Majesty in respect of rent, royalty, or tonnage-duty. The commissioners, doubting whether, in the cases of the Defendant and other persons who had commenced the working of mines since 1832, they ought to set out in their award the sums which might be payable by the Defendant and such persons respectively on account of past workings, or ought to confine the award to setting out the rules, regulations, and payments to be observed and made subsequently to the award, resolved to require the parties who had raised minerals before the date of the award to pay for the same before any award should be made in their favour. Applications were accordingly made by the directions of the commissioners to all such persons for an account of the quantity of the minerals and ore which they had raised. On the 5th of July, 1841, the clerk of the commissioners, by letter, informed the Defendant that they "had fixed the tonnage on his mine-work at *Sling Pit* at 4*d.* per ton, and requested him forthwith to render an account of, and pay for, past workings to the deputy-gaveller, in order that there might be no hindrance in the way of making the award, which they expected to sign in about a fortnight." Other persons rendered their accounts, and paid for their workings, according to the requisition of the commissioners; and on the 20th of July, 1841, another application was made by the commissioners to the Defendant, requesting him to give the matter immediate attention, as, in the event of his not arranging with the deputy-gaveller on that or the following day, "they

should have no alternative but leaving the Defendant out of the award." *W. H. Jackson*, the son of the Defendant, called on the commissioners the same day, and stated to their clerk, "that he had not been able to obtain an account of the number of tons worked, but that he would obtain it, and make arrangements with the deputy-gaveller for payment of the amount charged by the commissioners on account of the previous workings of the mine;" and the clerk of the commissioners thereupon said, "that, upon the faith of such promise and assurance, the award would be allowed to stand."

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The commissioners signed and executed their award on the 20th of July, 1841, and thereby allotted to the Defendant the *Old Sling Pit Iron Mine-work* (a). The son of the Defendant afterwards furnished the deputy-gaveller with an account of the ore raised by the Defendant from the mine previous to the award, which was 16,031 tons, amounting, at 4*d.* per ton, to 267*l.* 3*s.* 8*d.*, but the Defendant denied his liability to pay such sum.

(a) The award, after setting out the boundaries, proceeded, "rendering and paying therefore, to her Majesty, her heirs and successors, for all such iron ores as shall be brought out, the sum of four pence per ton as tonnage, such tonnage to be paid on the 24th day of June and 25th day of December in every year; and further, so working the said mine-work, as that there shall be wrought and gained in every year from Christmas next, a quantity of not less than 600 tons. Provided that if by any reason whatsoever, in any one year, no iron ore shall be got in respect of the said mine-work, or the tonnage rent to be paid for iron ore got within the year under the aforesaid reservation shall not amount to 10*l.*, then either the full sum of 10*l.*, or such other sum as, together with the amount paid or to be paid for tonnage rent in respect of iron ore got within the year (as the case shall be) will make up the full sum of 10*l.*, shall be made up and paid to her Majesty, her heirs and successors, on the 25th day of December in every year."

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The information by the Attorney-General prayed a declaration that her Majesty was entitled to the performance of the contract or undertaking thereby alleged to have been entered into by the Defendant; and that an account might be taken of the workings of the Defendant prior to the date of the award, and of what was due to her Majesty in respect thereof, at 4*d.* per ton, for all minerals and ores raised or gotten prior to that time; and that the Defendant might be decreed to pay what should be so found due, with interest; or that the award of the *Old Slings Pit* to the Defendant, which had been made on the calculation of such payment being made, and on the faith of such promise, might be declared to be in equity fraudulent, null, and void; and that an account might be taken of all minerals and ores raised or gotten by the Defendant from the said mine, and of the monies received and paid by the Defendant in respect thereof, and that the Defendant might be decreed to pay the balance, and surrender the mine; or that the Defendant might be decreed to pay some proper compensation for the use of the mine prior to the award to be determined, as the Court should direct.

The Defendant, by his answer, said, that before 1832 the free miners had the privilege of obtaining tracts of minerals within the forest and hundred, called "Gales," granted to them by the gaveller; in consideration of which the Crown had the right of putting in a fifth man to work and share the profit; but the right had not for many years been strictly exercised, and the gale owner usually arranged with the gaveller to pay a small sum per annum, which had not exceeded two guineas. That the gales, of which possession was taken after 1832, were held upon the expectation that similar galeage rents would be charged thereon, and

with this expectation the Defendant, in 1836, purchased from two of the free-miners the old Sling Pit, and he was always willing to pay a rent for the same commensurate with that, upon the expectation of the payment whereof he entered upon the possession of the premises. The Defendant denied the authority of his son to make any such promise, or enter into any such undertaking as the bill alleged; and submitted that the commissioners had no power under the act, either to make any award, or fix any liability on the Defendant for the past workings of the mine previous to the award. The Defendant said, that a high scale of tonnage had been fixed on the mine, on the consideration that he had been previously in possession without payment of rent.

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In support of the information witnesses were examined, who deposed to the conversation alleged in the information, and to the fact of the award having been executed on the faith of the promise then given by the Defendant's son. On the part of the Defendant, evidence was given that the right to put in the fifth man was not insisted on by the Crown; but that it was the custom to compound for the Crown's right. The Defendant's son was also examined, and he denied that he had made the promise to pay for the past workings, as alleged by the information.

Mr. *Romilly* and Mr. *Maule*, in support of the information.

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Mr. *Wood* and Mr. *Goodeve*, for the Defendant.

The several points discussed in the arguments will sufficiently appear upon the judgment.

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VICE-CHANCELLOR, after stating the substance of the information :—

The points made by the Defendant are, first, that no such agreement as the information suggests was ever made by him, or on his behalf. Secondly, if any such agreement was made between his son and the commissioners (which the Defendant insists was not the case), his son had no authority to make such agreement on his behalf; and thirdly, that, if the two preceding points were decided against him, the performance of such an agreement cannot be enforced in this or any other suit. Fourthly, he resists the alternative relief sought by the information, so far as it seeks to set aside the award. And, lastly, he insists, that, on the supposition that the award is allowed to stand, no relief can be given on this information.

The proof of the alleged agreement, assuming the Defendant's son to have had authority to make it, must, in the most favourable way of stating the question for the Crown, depend upon the construction to be put upon the letter of the 5th of July, 1841. Now, I do not think it admits of reasonable argument but that that letter, read by a stranger unacquainted with the relative position of the parties, must be understood to contain a demand by the writer that the Defendant should "render an account of and pay for his past workings" after the rate of fourpence per ton; but I am by no means satisfied that that is the meaning which the letter would convey to a person in the position of the Defendant when addressed by the commissioners. In order to understand this, it is necessary to observe the actual position of the parties. It seems, I think, clear that the recognised right of the Crown was to put in a fifth man as soon as the works were opened, and to take a fifth share of the produce of the mines. It does not, how-

ever, appear to have been customary for the Crown to exercise this strict right, but the right of the Crown was usually satisfied by some composition agreed upon between the officers of the Crown and the miner, and this composition appears in some cases to have been almost nominal. I do not find any instance of the right having been commuted for a tonnage duty. No such compositions appeared to have been made after the 9th of April, 1832, but many miners continued working their mines after that date; and others, including the Defendant, commenced working mines with the privity and consent of the gaveller after that day, without any definite arrangement having been come to as to the manner in which the dues of the Crown were to be satisfied. The act^(a) explicitly directs the commissioners to determine by their award the amount of the galeage rent, royalty, tonnage-duty, or other payments payable and to be paid to her Majesty for or in respect of iron-ore, to be got and raised by means of the several gales then existing, and which should be ascertained and set forth in their award, and so of other minerals; but the act does not appear to contain any provision applicable to the case of a person who, like the Defendant, had worked a mine by the permission of the Crown, without any composition having been agreed upon (unless such provision is contained under the word "due" in the 51st section, aided in construction by the word "custom" in the 52nd section): but whether that be so or not, it appears to me to be clear that the powers of the commissioners were confined (for the present purpose) to setting out metes and bounds to be held, and rents to be paid *thereafter* (taking into account the several matters, including by-gone workings mentioned in the act); but that they had no power to compel a miner to pay in ready money for

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by-gone workings, and to exclude him from their award, unless he would submit to such payment. And no injustice could follow upon this construction of the act, if the commissioners had strictly acted within their powers, — for the fact that no rent had been paid, or composition agreed upon, would be a circumstance to be taken into account by them under the 27th section of the act. I may observe further, that the circumstance of the commissioners having excluded from their award all mention of the agreement which is now sought to be enforced, is strong evidence to shew that the Crown cannot be taken by surprise in the conclusion to which I have come. The demand the commissioners made, as a condition precedent to the making of their award, might have operated injuriously upon parties interested. Looking, therefore, at the position of the Defendant, the rights of the Crown by custom, the manner in which these rights had been previously dealt with, and the limited power of the commissioners, I am not prepared to say that the Defendant was not justified in understanding the letter of the 5th of July, 1841, as an announcement that fourpence per ton would be payable for the future, accompanied with a demand of an account of his past workings, and payment of what was due, not after the rate of fourpence per ton (for that, in my view of the case, was not within the power of the commissioners), but after such manner as the Defendant was liable, independently of any determination of the commissioners. Such, certainly, must have been the construction of that letter in favour of any miner paying even a nominal rent; and I do not understand that any communication had taken place between the commissioners and the Defendant, as to their doubt, before the 5th of July, 1841. But again, whether that be so or not, if the only question before me were whether a Court of Equity would enforce specific performance of the alleged agree-

ment, according to the informant's construction of the letter of the 5th of July, 1841, I incline strongly to say the Court ought not to do so.

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If my conclusion were wrong on the above point, I think I could not bind the Defendant by the acts which are proved against the son. Admitting that the son was his father's agent in managing the mines, (a fact which the Attorney-General has not proved, and which can only be got at from a passage in the answer, which the counsel for the information declined to read as evidence), I cannot hold that he was the Defendant's agent for the purpose of making a contract with the commissioners as to matters not within the powers conferred upon them by the act.

making a contract with the commissioners, not within the powers which had been conferred upon them in that character.

The agent employed by a miner in the management of his mines, and in his communications with the commissioners for setting out the metes and bounds and fixing the rents and duties in respect thereof, —is not therefore the agent of the miner for the purpose of

had been con-

The opinion which I have expressed upon the first and second points, supersedes the necessity of my giving an opinion upon the third point, and I shall refer to it only for the purpose of qualifying some observations I made at the close of the argument. The view which I then took of the case was, that it was one of that class in which the refusal of the defendant to pay the stipulated sum might perhaps have been available to the Crown by way of defence to any proceeding the Defendant might have been compelled to take against the Crown touching the award, or perhaps a ground for setting aside the award, but that, consistently with modern cases, the Crown could not, after the award was made, sustain an information for the purpose of adding to it the parol agreement, which is the subject of the present suit. Not meaning to withdraw that opinion, I think it right to say I have met with a case decided by Lord

Seemle—The refusal to pay a sum of money according to an agreement, upon the faith of which an award was made, although it was a stipulation which the commissioners making the award were not empowered to insist upon,—would be a ground upon which in equity the party to whom the monies were to have been paid might resist the performance of the award, if the other party had sought the aid of the Court to enforce it.

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Thurlow, Pember v. Mathers (a), which so nearly resembles the present case, that I have felt bound, after the observations I made, to refer to it. The case is observed upon by *Sir William Grant* in *Clarke v. Grant* (b), and is, perhaps, not easily reconcileable with some modern decisions.

The next question then is, whether I should set aside the award. This I can only do on the ground of fraud or mistake: the former of these grounds must, I am clear, be excluded. There is no pretence for imputing fraud, actual or constructive, to the Defendant. With respect to mistake, the first question is, to whose mistake is the difficulty which has arisen to be ascribed? It must, I think, be ascribed to the commissioners. Had they pursued and confined themselves within the powers pointed out by the act, the difficulty would not have arisen. It has arisen solely out of the attempt of the commissioners to do that, which I admit, was most desirable, if it could be done, to settle at once all disputes or grounds of dispute between the Crown and the miners. But for this the act of Parliament did not provide in the way attempted, though it did perhaps in another way,—by taking into account, under the 27th section, the fact that no rent had been paid. The attempt, however commendable in itself, has unfortunately led to the present litigation. Before I can decide, then, to set aside the award on the ground of mistake, I must consider what the consequences to the parties will be. The Defendant, by the terms of the act, is entitled to be included in the award. The commissioners had no discretion as to that: their discretion was confined to the terms on which the Defendant was to hold the mine. But the time limited by the act

(a) 1 Bro. C. C. 52.

(b) 14 Ves. 524.

within which the commissioners were to make their award, expired a few days after its date, and they have now no power to make a new award. If, therefore, I were to set aside the existing award, the Defendant would lose the whole benefit of the act of Parliament, and that on account of the mistake of the commissioners. In other words, I should be relieving the Crown against the mistake of the commissioners, where I cannot restore the Defendant to his parliamentary rights.

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It was said, however, that the loss to the Crown must be taken into consideration. It might be a sufficient answer to that, to say (as I already have done), that the Crown has no right to be relieved from the consequences of a mistake of the commissioners, at the expense to the Defendant already pointed out; but I am not prepared to admit that the Crown will sustain the injury which the argument supposes. I give entire credit to the statement that the award in the Defendant's favour was based upon the supposition that he was to pay the 4*d.* per ton for past workings, which is the subject of the present suit. But I am not satisfied that the Crown will therefore be injured by the award. It must have been intended by the commissioners that the Defendant should have at least as much land as he could exhaust in a due course of working during his tenancy. If he has not got more than that the Crown is not damnified. And if he has got more, the excess will revert to the Crown at the expiration of his tenancy. I think there is weight in the observation made at the bar, that the question of metes and bounds was a question between the different miners, rather than between the Crown and any particular miner.

I ought before to have observed, that the alleged mis-

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take in this case is not attributed, nor could it properly be attributed by the information to any suppressio veri, or suggestio falsi by the Defendant, nor to any ignorance on the part of the commissioners as to matters necessary to guide their judgment in making their award. The complaint is, that the defendant has refused to fulfil a promise made by him, and the mistake, if any, was the mistake of the commissioners, in supposing, if they did suppose, that they had power to deal with dues in respect of the past working of the mines.

The utmost that can result from this conclusion is, that the liability of the party to the Crown for the past workings, remains what it was before the award. He is not discharged, and therefore in that way the Crown also may recover its rights (if rights it has), and that is the fifth question. The right to relief in respect of past working of the mine, allowing the award to stand, is purely a legal question; but it is a question in which perhaps the aid of this Court is necessary as to the account which may be taken. I shall therefore retain the Information, with liberty to the Attorney-General to take such proceedings as may be thought right, to establish the right of the Crown at law. If the right of the Crown shall be established, then it is competent for him to ask the relief in this Court which he cannot obtain at law, or cannot obtain so effectually as he may do by the aid of this Court.

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9th, 11th, &
13th Nov.
16th Dec.

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IN June, 1843, the Plaintiff, *Thomas Aquila Dale*, who was a surveyor and land agent, at Birkenhead, in the county of Chester, entered into a contract, in the name of *Robert M^cAdam*, a merchant at Liverpool, with one *Forsyth* and his trustees, for the purchase of a parcel of land in *Birkenhead*; and the Plaintiff sent to Mr. *M^cAdam* a letter, dated the 24th day of June, 1843, as follows:—

“I am happy to inform you that I have made a most excellent arrangement for the 26,000 yards of land, *Prices Street* and *Camden Street*, *Birkenhead*, being at four shillings and nine pence (say 4s. 9d.) per square yard; the present proprietor to pay for making *Prices Street*, which is now being completed. I consider this one of the best purchases that has been made for some time, as I can clearly see a profit in it of at least 100 per cent. It must be understood that I am to be interested in the purchase, taking profit and loss of one-third; I taking all the trouble of laying out the lots and selling, and you finding the capital; and before any division of profits are made, you to receive interest at 4 per cent. per annum on all monies employed in such speculation.

A partnership agreement between A. and B., that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the Statute of Frauds; and such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing.

“THOMAS DALE.”

To this letter, *Robert M^cAdam* replied as follows:—

“28th June, 1843.

“I received your letter of the 24th inst., and shall be in Liverpool on Saturday, when I shall have the pleasure of seeing you.

“R. M^cADAM.”

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Soon after this contract was made, and before the purchase was completed, *Robert M'Adam* agreed with the Defendant, *Robert Hamilton*, a surgeon at Liverpool, that they (*M'Adam* and *Hamilton*) should advance each a moiety of the purchase-money, and be jointly interested in the purchase.

The Plaintiff, soon afterwards, in the name of *M'Adam*, entered into a contract with one *Hillier* for the purchase of an adjoining plot of land at Birkenhead, which *Hillier* was under an agreement to purchase from the same vendors, and which contained 480 square yards. In September, 1843, the Plaintiff prepared, and sent to *Robert M'Adam* a written agreement or memorandum, in the following words:—

“Memorandum of Agreement as to the terms on which *R. M'Adam*, Esq., and *T. A. Dale* are jointly interested in speculation of land situate at *Prices Street*, *Lord Street*, and *Camden Street*, *Birkenhead*, as purchased from *T. Forsyth* and his trustees, and also from *J. Hillier*, by the said *R. M'Adam*; that purchased from *T. Forsyth* and his trustees, containing 25,400 square yards, at 4*s.* 9*d.* per square yard; that from *Hillier* containing 480, at 8*s.* 6*d.* per square yard—General terms affecting such speculation; all accounts to be made up annually upon the principle of a banking account; interest at 5 per cent. to be credited to *R. M'Adam*, who engaged to advance the whole of the capital for working the said speculation to advantage; and all monies advanced to bear interest from the time of payment; and all monies received to go to the credit of the said account; the interest on such portions ceasing. This speculation is to be as follows, viz.—that *R. M'Adam* takes two-thirds of profit and loss, and *T. A. Dale* takes one-third of profit and loss; *T. A.*

Dale to make all measurements and surveys of land, supply all plans, survey all buildings at any time in progress, and do any business within his department or power, and effect sales, without any charge. This agreement for ourselves, executors, administrators, and assigns."

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The purchase-money of the two parcels of land, amounting to 6248*l.* 7*s.* 6*d.*, was paid by *M^r Adam* and *Hamilton* in equal moieties; and, by an Indenture, dated the 16th of October, 1843, both parcels were conveyed to *M^r Adam* and *Hamilton*, to hold the same in undivided moieties to them respectively, and to their respective heirs and assigns.

A memorandum of agreement made and signed by *M^r Adam* and *Hamilton* expressed the terms of their contract to be as follows:—

"Memorandum of an agreement between *Robert M^r Adam* and *Robert Hamilton*, made the 27th of October, 1843, relative to a lot of land in *Prices Street*, *Lord Street*, and *Camden Street*, *Birkenhead*, say 25,400 square yards purchased from *Thomas Forsyth* and his trustees, at 4*s.* 9*d.* per square yard, £6044 7*s.* 6*d.*,

480 square yards purchased from *J.*

Hillicr, at 8*s.* 6*d.* per square yard , 204 0 0

£6248 7 6.

That the said *Robert M^r Adam* and *R. Hamilton* shall advance each one-half of the purchase-money, and that they shall receive interest on the same at the rate of 5 per cent. per annum, which interest is to be made up half yearly, and calculated the same as bankers' accounts: That the said *R. M^r Adam* and *R. Hamilton* are to have each one-third interest in the said purchase;

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and that they are to reserve one-third of the profits arising therefrom for *T. A. Dale*, in lieu of his commission for purchasing, selling, surveying, valuing, laying out in lots, or any other services that may be required of him; but it is clearly and distinctly understood that said *T. A. Dale* shall have no power or authority whatsoever over the said land, and that he shall not be entitled to receive any compensation whatsoever therefrom until the whole is sold and paid for, and all outlay and expenses incurred thereon are deducted therefrom.

“R. M'ADAM.

“R. HAMILTON.

“*Liverpool*, 27th October, 1843.”

In December, 1844, *Robert M'Adam* died, having devised his real and personal property to six persons, in equal shares, and appointed two other persons his executors.

After the death of *M'Adam*, the Defendants, *Hamilton* and the devisees under the will of *M'Adam*, proceeded to make a partition of the land comprised in the purchase, by conveying, in severalty, one moiety to the Defendant, *Hamilton*, and the other moiety, in six lots, to the devisees of *M'Adam*. Conveyances were prepared, and were about to be executed for this purpose, when the Plaintiff called upon the Defendants to fulfil the contract, which he alleged had been made between himself and *M'Adam*, under which the Plaintiff claimed to be entitled to one-third of the profits to be derived from the purchase.

Bill.

The bill was filed in June, 1845, and the Plaintiff thereby stated, that, as a surveyor and land agent, he had become peculiarly qualified, by knowledge and experience, to judge of the value, and of the best mode of

laying out and disposing of land at Birkenhead, a town which had rapidly grown, and was still increasing in importance; and that *Robert M'Adam* proposed, in the year 1843, to enter into a joint speculation, in land, with the Plaintiff, the Plaintiff to select and conclude the necessary contracts for a suitable quantity of land, and to exercise his best skill and judgment, and professional services, in laying out and preparing such land for sale, and in superintending and negotiating the sale thereof; and *Robert M'Adam* to advance or provide the purchase-money, which was to be repaid to him with interest out of the proceeds of the re-sale before any division of the profits should be made. One-third of the profit or loss of such speculation to be shared and borne by the Plaintiff, and two-thirds by *M'Adam*: That the Plaintiff agreed to enter into the speculation upon the terms proposed; and agreed, also, that the land to be purchased should be conveyed to *M'Adam*, for their joint benefit. The Plaintiff alleged that it was in pursuance of this agreement that he had selected and purchased the land comprised in the contracts with *Forsyth* and others, and *Hellier*: That shortly after the letter of the 28th of June, 1843, in reply to the Plaintiff's communication that the larger purchase had been made, *Robert M'Adam* called upon the Plaintiff and ratified the terms of the agreement, as stated in the Plaintiff's letter of the 24th of June, 1843, except that the Plaintiff, at the suggestion of *M'Adam*, then agreed that the latter should be allowed 5 per cent. interest on the purchase-money or capital which he might expend, and *Robert M'Adam* promised, that, on the completion of the purchase, a formal memorandum, in writing, of the terms of the agreement should be made and signed by both parties: That the Plaintiff subsequently consented to the admission of *Hamilton* to a participation in the contract. The bill alleged that *M'Adam*, being subse-

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quently pressed by the Plaintiff to sign the memorandum which the Plaintiff had sent to him in September, 1843, handed to the Plaintiff a copy of the memorandum of the 27th of October, 1843, signed by *M^r Adam* and *Hamilton*, and said he considered that memorandum to be sufficient, and that he would not sign any other.

The bill charged that the Plaintiff had always objected to so much of the memorandum of the 27th of October, 1843, as purported to exclude him from any power or authority over the land, the same forming no part of the original agreement; however, the Plaintiff accepted and determined to take the benefit of the said memorandum, until some other sufficient declaration of trust should be executed, subject and without prejudice to his rights in all other respects; and the Plaintiff submitted that the effect of such memorandum, as a declaration of trust in his favour, ought not to be prejudiced by the clause of exclusion; but if no effect could be given to the Plaintiff's rights, except subject to that clause, then the Plaintiff submitted to be bound by the clause, according to its just construction.

The bill prayed that the lands in question might be sold for the best price that could be obtained, and that the accounts of the said joint speculation might be wound up and adjusted, and the monies to arise from the sale applied and distributed under the direction of the Court, in conformity with the terms of the said agreement between the Plaintiff and *Robert M^r Adam*, the Plaintiff being ready and offering to render and perform all such services, in regard to the sale, as ought to be rendered and performed by him, pursuant to the agreement; that the Defendants might be ordered to do and execute all necessary and proper acts and deeds

for the purposes of the decree, and might, in the meantime, be restrained from making a partition, sale, or conveyance of the land, or in any manner parting with or encumbering the same.

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The Defendant, *Robert Hamilton*, by his answer admitted that *M'Adam* had, about June or July, 1843, communicated to him (*Hamilton*) that he (*M'Adam*) had contracted for the purchase of the land at *Birkenhead*, upon the speculation of making streets or roads across the same, and selling it in lots for building purposes, and that he invited the Defendant to join him in the speculation. The defendant admitted that *M'Adam* then said that he had employed the Plaintiff to aid him in making the purchase, and in laying out and disposing of the land for building, and that he had agreed to give the Plaintiff, by way of remuneration, and in lieu of all commission and other recompense, a clear third part of the profit which should be ultimately realized, charging 5 per cent. interest on the outlay, to be calculated half-yearly, as on bankers' accounts, such remuneration to depend entirely upon and to be payable only out of such ultimate profit; that *M'Adam* represented to the Defendant that such arrangement had been made with the view of securing the best services and energies of the Plaintiff throughout the speculation, and that the Defendant agreed with *M'Adam* to advance one half of the money, and take upon himself one half of the said speculation. The Defendant, *Hamilton*, also said, that, being under the impression that the agreement of the 27th of October, 1843, was binding upon him, and intending strictly to fulfil the same, if the Plaintiff would have performed the services thereby on his part stipulated, instead of seeking to prejudice the speculation by a forced or hasty sale of the land, he (the Defendant) had, at an interview with the Plaintiff in May, 1845,

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admitted, that, upon a sale of the lands, the Plaintiff would be entitled to a third of the profits, according to the terms of the agreement of the 27th of October, 1843.

The Defendants, the devisees of *Robert M'Adam*, by their answer stated, that they resided at *Swansea*, and had no personal knowledge of the matters alleged in the bill. They admitted that the several letters addressed by the Plaintiff to *M'Adam*, requesting that an agreement shewing the joint interest of the Plaintiff in the land might be signed by *M'Adam*, had been found by the executors of *M'Adam* amongst his papers, and that an entry was found, in the handwriting of *M'Adam*, in his ledger, to the effect of the agreement of the 27th of October, 1843.

The defendants, *Hamilton*, and the devisees of *M'Adam*, said that the Plaintiff had, in July, 1845, sold his business of surveyor and land-agent at *Birkenhead*, and that he had ceased to reside at *Birkenhead*, and taken up his residence at *Cheltenham*; and therefore they submitted, that, if any such alleged agreement had been made, the Plaintiff had become unable to perform such part thereof as he stated in his bill he had undertaken to perform; and they claimed to be entitled to hold and retain the land in question for their own use and benefit, to the absolute exclusion of the plaintiff from all share and interest therein.

The Defendants, the executors of *Robert M'Adam*, set forth in the schedule to their answer, the documents relating to the purchase which they had found amongst the papers of *Robert M'Adam* since his decease, including the Plaintiff's letter of the 24th of June, 1843,—the memorandum of agreement stated in the bill to have been sent by the Plaintiff in September, 1843, to

M^r Adam for his signature, but containing no note or mark made by *M^r Adam*;—a letter from the Plaintiff to *M^r Adam*, dated the 18th of August, 1843, as follows: “Enclosed I beg to send you a short agreement between you and myself, respecting land in *Price Street*, &c., *Birkenhead*. Yours truly, T. A. DALE;”—and also other letters from the Plaintiff to *M^r Adam*, requesting a note or memorandum of the terms of the alleged agreement. Among these was a letter of the 14th of November, 1843, in which the Plaintiff requested *M^r Adam* to give him a note, expressing that no sale should be effected without the Plaintiff being consulted, and that as soon as the whole of the outlay, with interest, was reimbursed, the Plaintiff should then from time to time receive one-third of all subsequent sales.

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The Defendants submitted that the memorandum of agreement of the 27th of October, 1843, was not a contract with or a declaration of trust in favour of the Plaintiff, and that the Plaintiff had no right, estate, or interest whatever, either at law or in equity, to or in the land; the Defendants claimed the protection of the Statute for the prevention of frauds and perjuries, which enacted that no action should be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action should be brought, or some memorandum or note thereof, should be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised (a). The defendants submitted, that the Plaintiff had no other right, interest, or claim than for a just and reasonable compensation for all

(a) Stat. 29 Car. 2, c. 3, s. 4.

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such services as he had rendered, and might render, in the disposing of the land to the greatest benefit; that they had offered to pay him such fair and just compensation; and they thereby offered him 1000*l.* for the services he had already rendered.

The letters from the Plaintiff to *M'Adam* and the memorandum were given in evidence; and it was proved that *M'Adam* had made in his ledger, under the date of October, 1843, this entry:—"D^r.—Purchase of land in *Prices Street, Lord Street, and Camden Street, Birkenhead*. The money to be advanced one-half by *Robert M'Adam*, and one-half by *Robert Hamilton*. *Robert M'Adam* to have one-third interest in said purchase. *Robert Hamilton* to have one-third interest, and the profits arising therefrom after deducting all outlay and expenses thereon to be reserved for Mr. *T. A. Dale*, in lieu of commissions, &c., &c., as specified in agreement between *Robert M'Adam* and *Robert Hamilton*, dated 27th October, 1843." The evidence also shewed that the value of the land had greatly increased. The estimate of the amount which might be produced by a sale or sales varied from 25,000*l.* to 47,000*l.* The defendants proved that the Plaintiff had in July, 1845, sold his business at *Birkenhead*, and that he had gone to reside at *Cheltenham*.

Argument.

Mr. *Romilly* and Mr. *Roundell Palmer*, for the Plaintiff.

Mr. *Rolt* and Mr. *Willcock*, for the Defendant *Hamilton*.

Mr. *Wood* and Mr. *Fleming*, for the Defendants the devisees and executors of *M'Adam*.

The principal questions argued were, first, whether the proof of the alleged partnership (the entire subject of the dealing being land) was sufficient to take the case out of the operation of the Statute of Frauds, or whether the cases in which that effect had been given to a partnership contract were not cases in which the dealing in land was only an incident to the partnership business, and not cases in which the partnership wholly grew out of the dealing in land. *Lake v. Craddock* (a), *Lloyd v. Spillet* (b), *Forster v. Hale* (c), *Jackson v. Jackson* (d), *Tawney v. Crowther* (e), *Gregory v. Williams* (f), *Crawshay v. Maule* (g), *Nerot v. Burnard* (h), *Fereday v. Wighthwick* (i), *Lees v. Nuttall* (k), *Peck v. Cardwell* (l), *Welford v. Beazely* (m). Secondly, supposing that the existence of a partnership obviated the effect of the Statute, whether there was sufficient evidence of a partnership between the Plaintiff and *M^r Adam* and *Hamilton*? *Smith v. Watson* (n), *Reid v. Hollinshead* (o), *Braithwaite v. Skofield* (p), *Nerot v. Burnard* (q); or to establish a ground for a further inquiry on that point: *Ex parte Langdale* (r), *Gardner v. Rowe* (s). And, lastly, if there were no partnership, or the partnership were not a ground of relief, whether the agreement of October, 1843, between *M^r Adam* and the Defendant *Hamilton*, or the other circumstances of the case operated to raise a trust on behalf of the Plaintiff: *Kine*

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Argument.

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| (a) 3 P. Wms. 158. | (k) 1 Russ. & Myl. 53. |
| (b) 2 Atk. 148. | (l) 2 Beav. 137. |
| (c) 3 Ves. 696; S. C. 5 Ves. | (m) 3 Atk. 503. |
| 308. | (n) 2 B. & C. 401. |
| (d) 9 Ves. 591. | (o) 4 B. & C. 807. |
| (e) 3 Bro. C. C. 161. | (p) 9 B. & C. 401. |
| (f) 3 Meriv. 582. | (q) Ubi sup. |
| (g) 1 Swanst. 518. | (r) 18 Ves. 300. |
| (h) 4 Russ. 261. | (s) 5 Russ. 258. |
| (i) 1 Russ. & Myl. 45. | |

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v. *Balfe* (a), *Boyce* v. *Greene* (b), *Austin* v. *Chambers* (c),
Garrard v. *Lord Lauderdale* (d), *Walwyn* v. *Coutts* (e),
Acton v. *Woodgate* (f), *Morton* v. *Tewart* (g).

Judgment. VICE-CHANCELLOR:—

I cannot think that any one, reading the admission in the answer of the Defendant *Hamilton*, and reading also the memorandum signed by *Hamilton* and *M^r Adam*, and being at liberty to assume that such a contract was in fact made, can have any doubt of what the justice of the case requires. The land has risen from 6000*l.* to near 30,000*l.* in value, and yet the Plaintiff's right to participate in that profit is altogether denied. It is said, however, that the Defendants are in law entitled to hold the land free from the Plaintiff's claim; and if they are so, I certainly shall not, merely on moral grounds, take upon myself to alter what I find the law of the case to be.

The principal ground of defence was founded on the Statute of Frauds; and to that question I shall first address myself. The Plaintiff, claiming an interest in land which is vested in the Defendants, has not produced, and he admits there was not, any agreement in writing signed by *M^r Adam*, such as he alleges to have been made between himself and *M^r Adam*. The Plaintiff admits that the agreement between himself and *M^r Adam* was by word of mouth only, and he has not relied upon any act of part-performance in the sense, which, according to the doctrines of this Court, would, in

- (a) 2 Ba. & Be. 343.
- (b) *Batty*, (I.), 608.
- (c) 6 Cl. & Fin. 1.
- (d) 3 Sim. 1.

- (e) 3 Sim. 14.
- (f) 2 Myl. & K. 492.
- (g) 2 Y. & C. C. C. 67.

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general, take the case out of the Statute of Frauds. It is, in general, of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in, if there were no contract. Of this, a common example is the delivery of possession. One man, without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as shewing unequivocally that some contract has taken place between the litigant parties; and it has, therefore, on that specific ground, been admitted to be an act of part-performance: *Morphett v. Jones (a)*. But an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not, in general, admitted to constitute an act of part-performance taking the case out of the Statute of Frauds; as, for example, the payment of a sum of money, alleged to be purchase-money (*b*). The fraud, in a moral point of view, may be as great in the one case as in the other; but in the latter cases the Court does not in general give relief. In *Mundy v. Jolliffe (c)*, however, the Lord Chancellor decreed a specific performance, on the ground of part performance, where the acts were certainly equivocal; fraud, he said, was enough. In the present case the only acts done have been the conveyance, which apparently negatives the alleged contract, and the acts of the Plaintiff, which may as naturally be referred to his character of a hired surveyor and agent, as to a contract giving him an interest in land.

The Plaintiff, however, has relied upon another ground for taking the case out of the statute. He says,

(a) 1 Swanst. 172.

(b) See Sugden, V. & P. 140—142, ed. 11.

(c) 9 Sim. 413.

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that where a partnership or an agreement in the nature of a partnership exists between two persons, and land is acquired by the partnership as a substratum for such partnership, the land is in the nature of the stock in trade of the partnership; and that, the partnership being proved as an independent fact, the Court, without regarding the Statute of Frauds, will inquire of what the partnership stock consisted, whether it be of land or of property of any other nature.

That land acquired as the substratum of a partnership is in this Court considered in the light which the Plaintiff contends for, may be admitted upon very high authority, *Crawshay v. Maule* (a), *Fereday v. Wightwick* (b); and that where a partnership exists, and land is brought into, and actually held and used by, the partnership, for partnership purposes, the Court has dealt with it as partnership property, although the ownership, apparently, has not been in all the members of the firm, or, if in all, not apparently as partners, but under another title; and that the Court has so done, without calling in aid the doctrine of part-performance, must I think be also admitted (c). But whether a simple case, like that before me, divested of every thing but an agreement for a partnership, can be brought within the scope of the cases relied upon, is a question of no inconsiderable difficulty.

When the proposition was first advanced by the Plaintiff, I confess, it appeared to me, that to admit the argument to the extent contended for would virtually be to repeal the Statute of Frauds, or nearly so; for if a party, by alleging an interest in land of any specific kind, can escape from that safeguard against fraud and perjury which the statute has provided, it

(a) 1 Swanst. 518.

(b) 1 Russ. & Myl. 45.

(c) See *Custance v. Brad-*

shaw, 4 Hare, 315.

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remains only that those, who are prepared by fraud and perjury to invade the rights of another, shall make that specific interest (to which it is said the act does not extend) the ground of their claim, and the statute is at once evaded. Thus, if A. alleges that B. agreed to give him an interest in land, the statute applies; but, if he adds, that the land was to be improved and resold at their joint risk for profit and loss, then, according to the argument, the statute does not apply. At the same time, if decision has established the general proposition for which the Plaintiff contends, it is not because his case (being within the authorities) is an extreme case, that I am at liberty to refuse him the benefit of such authorities. The case may exemplify the inconvenience of such an exception to the Statute of Frauds, but if the exception be established, and if the case be within it, the Plaintiff is entitled to the relief he asks.

In order to try this question in the most simple manner, I will suppose the case to be the converse of what it is. I will suppose that the land purchased, instead of rising, had fallen in value; that a loss had been sustained, and that *Hamilton* and *M^r Adam* were the Plaintiffs seeking to compel *Dale* to contribute his proportion of the loss. If in that case the authorities would have enabled *Hamilton* and *M^r Adam*, by proving the partnership with *Dale*, and that the land was part of the partnership stock and effects, to have compelled contribution from *Dale*, the same authorities will, upon like proof, support the present suit, upon the principle—that of mutuality in remedies—which enables a vendor to recover the purchase-money in this Court, though the remedy at law may be equally adequate and more appropriate; not, however, that the remedy at law would be equally adequate in this case, if the Plaintiff is right in that which he contends for.

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In *Jeffereys v. Small* (a), two persons jointly stocked a farm, and occupied it as joint tenants; one died, and the bill was to be relieved against survivorship. The *Lord Keeper* said, that if the farm had been taken jointly by them, and had proved a good bargain, survivorship would take place; but, as to a joint undertaking in the way of trade, or the like, it was otherwise. In the case of *Jackson v. Jackson* (b), Lord *Eldon*, referring to this case, says, "The general law of inermchants, originally applicable to trade only, has been extended a good deal—*Jeffereys v. Small*, approved, with some distinctions, in subsequent cases." The bearing of that case upon the principal case is closer than at first sight appears. The two parties were joint tenants by the original title. Their expenditure was equal, the perception of profits was equal, their acts and dealings were simply consistent with their rights as joint tenants, and, therefore, not evidence—certainly not unequivocal evidence, of an intention of the parties to alter their relative position as joint tenants; yet the Court appears to have admitted evidence of a contract to deal with it as in trade, and followed that contract up with its consequences. *Lake v. Craddock* (c) is an analogous case, in some respects, to the last, but it may not perhaps be considered an important authority for the Plaintiff's proposition, except so far as it shews that a joint speculation in improving land, on a hazard of profit and loss, is treated in this Court as in the nature of merchandise, and the jus accrescendi not allowed; for it may be collected from the report, that the partnership contract between the litigant parties was admitted, and the only question was upon the consequences of that contract. These consequences certainly were carried a

(a) 1 Vern. 217, (1683).

(b) 9 Ves. 591.

(c) 3 P. Wms. 168, (1729).

great length; for one of the five original contractors, who had retired for nearly thirty years, was held bound by a subsequent contract, made by the other four, for the purchase of other lands in aid of the original design. "Supposing," said the Master of the Rolls, "one of the partners had laid out the whole money, and had happened to die first,—according to the contrary construction he must have lost all; which would have been most unjust." Lord *Eldon's* comment upon that case is this:—"The purchase of the land was made to the intent, that they should become partners in the improvement;—that it was only the substratum for an adventure, in the profits of which it was previously intended they should be concerned (a)."

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—
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The next case,—that of *Elliot v. Brown* (b), cited from Lord *Colchester's* Notes (b), has a closer bearing upon the present case. Two persons took a joint lease of a farm, and farmed it on their joint account. One died before the expiration of the lease. The title of his executors to a moiety of the stock was admitted by the survivor, but the survivor claimed the remainder of the lease by survivorship. The Lord Chancellor said,—“By the joint tenancy the lease would survive; yet, if turned by agreement into a partnership, it would not survive.” The law (he said) was clear. The only question was, whether the agreement existed. He thought the lease accessory to the trade in which the parties were embarked. Of this case Lord *Eldon* says,—“I have a note of my own of a case of *Elliot v. Brown*, in which another distinction was taken by Lord *Thurlow*,—that the law with reference to the stock would be the same as to the lease, provided the lease was taken for the same purpose as the stock, and the

(a) 9 Ves. 597.

(b) 3 Swanst. 489, n., (1791),

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lease was only the substratum"(a). The observation I made upon *Jeffereys v. Small* applies to this,—a joint tenancy by two,—personal occupancy by the two,—equal expenditure by the two, and equal profit to the two: all consistent with a joint tenancy. In the absence of contract, survivorship would be the legal consequence; but the Lord Chancellor says, if there were a contract for a partnership it shall prevail, and the right of survivorship shall not attach. In these cases, without any contract in writing, or any dealing with the property by the joint tenants which was not consistent with the title by joint tenancy, the Court admitted evidence of a partnership contract, whereby the rights of the joint tenants, inter se, were varied.

The next case I shall refer to may, perhaps, be considered as going much further, In *Forster v. Hale* (b), four persons, of whom *Burdon* was one, were bankers, in partnership. In June, 1791, *Burdon*, *Peareth*, and two other persons took a lease of the Hepburn colliery for thirty-one years, as tenants in common, in equal fourth parts. The colliery was carried on under the firm of *Burdon, Peareth & Co.* *Burdon* died in December, 1792, and the bill was filed by two of the surviving partners in the bank against the executors of *Burdon*, claiming an interest as partners with *Burdon* in the fourth share of the colliery to which he was entitled under the lease. It is material in this case to observe, that the partners in the bank, other than *Burdon*, never intermeddled with nor had any visible possession of the colliery. The colliery banked with the plaintiff's firm, and the private books of the bank shewed, that the bankers, besides *Burdon*, were treated as jointly interested with him. *Burdon* lived a long way off, and was not present at the bank, but he was a partner of the

(a) 9 Ves. 506.

(b) 3 Ves. 696, (1798).

firm. In the argument of the case at the Rolls three points were made: first,—that, by *Burdon's* letters, produced in the cause, a trust for his copartners in the bank was manifested and proved within the Statute of Frauds; secondly, that a trust by implication arose upon the entries in the banker's books; and thirdly, as it would appear by the arguments of counsel, although not by the statement of the case,—that a colliery was an article of trade, and therefore that the agreement was not to be considered as an agreement concerning land. The Master of the Rolls held, that, by the letters of *Burdon* sent by him, a trust for his partners in the bank was manifested and proved; and, he said, "I should have decided upon this evidence alone, provided there was no other evidence to rebut it in the other parts of the case." He does, however, examine the other circumstances of the case, not for the purpose of seeing whether he could found a decree in the Plaintiff's favour upon them, but for the purpose only of seeing whether the acts of the parties shewed that his inference from *Burdon's* letters was an erroneous inference. Amongst other facts, he shews, (as did the Lord Chancellor afterwards on appeal,) that the banking firm contributed to the expense of working the colliery. But in neither branch of the Court was it intimated that this would create a resulting trust to take the case out of the Statute. *Burdon* in fact never saw the books; nor was there any signature in them. The case was carried by appeal to the Lord Chancellor, and Lord Rosslyn expressed his entire concurrence in the conclusion to which the Master of the Rolls had come, upon the grounds on which he had founded it; but he considered the case as wholly out of the Statute of Frauds. The Lord Chancellor, at the opening of the case, observed, that the question was not, whether there was a declaration of trust within the Statute, but,

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—
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“whether there was a partnership?” the subject being an agreement for land, the question was, “whether there was a resulting trust for that partnership by operation of law. The question of partnership,” he adds, “must be tried as a fact, and as if there was an issue upon it; if by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence by which a partnership may be found, the premises necessary for the purposes of that partnership are, by operation of law, held for the purposes of that partnership” (a). It is right, however, that I should notice another passage in the judgment of the Lord Chancellor from which it may possibly be thought that the force of the preceding language is in some degree weakened. He observes, that upon the first view he thought it was a case independent of the Statute; and then he says,—“the case appeared to me in rather a different point of view. From the nature of it, it seems to me, there was no occasion to affect the estate in the land; nor has the decree done so. It has not transferred the legal interest in the share of the colliery to the plaintiffs. The case is merely the case of agreement to share profit and loss in the trade of a colliery; which does not at all affect the ownership of the land, which is often carried on for a great number of years without any estate in the land given to those who are to share the profits. Nothing is more common than where a man is tenant in fee of land, where there is a coal work, he, partly sharing the rent and the profit, carries it on by mere license with other persons concerned in the business of the colliery. It is, therefore, merely the case of an agreement which may or may not

(a) 5 Ves. 309.

be within the fourth section of the Statute. But this particular case is not even within the fourth section, because it was to be executed immediately" (a). The Lord Chancellor then proceeds to shew that the evidence proves the partnership, and concludes—"therefore, though an issue might have been had perhaps before the cause was canvassed, I cannot direct an issue; for if the verdict found that these plaintiffs were not engaged in partnership with *Burdon* in this colliery, I should not let that verdict stand" (b).

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The case of *Peck v. Cardwell* (c) bears on the principal case in one of its aspects, but not, I think, in that which I am now considering.

The principle upon which I presume the above cases have proceeded has been partly the jurisdiction of the Court in cases between partners touching the partnership property, and partly its jurisdiction to relieve against the fraud of a partner, who should avail himself of his legal rights in violation of his partnership contract; a fraud, as against which no remedy or no adequate remedy could be had at law. Is, then, the hypothetical case I am considering within the scope of the cases above referred to, and one in which I am bound to receive general evidence of the partnership contract, which the Plaintiff suggests, and to follow it up, if proved, with the consequence contended for? In order to try this, let it be assumed that by parol evidence of unexceptionable credit the alleged contract can be proved, and that the Plaintiff, in pursuance of it, selected the land for purchase, made the contract for it, and laid it out, and did every act which the contract required him to do; *Hamilton* and *M'Adam* paying

(a) 5 Ves. 314.

(b) Id. 322.

(c) 2 Beav. 137.

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the purchase-money; and a loss having been sustained, he refused to contribute to the loss. I confess I do not see what in principle there would be in that hypothetical case to distinguish it from the cases referred to. If in *Jeffereys v. Small* and *Elliot v. Brown* (I omit for the present *Forster v. Hale*) general evidence was admissible to alter this contract (the apparent rights of the parties being those of joint tenants), though there was no agreement in writing, and their acts were altogether and simply consistent with a joint tenancy, why should it be excluded in the case supposed? The circumstance that each joint tenant had an interest in the land, cannot affect the question as between themselves; and the circumstance that each was in possession made no difference, because their interest as joint tenants explained it; yet the Court, without any writing, and without once referring to the doctrine of part-performance, held that the rights of the partners, inter se, were altered by force of the partnership contract, and that alone. If the existence of a partnership contract were a sufficient reason to give new and altered interests in land in those cases, what but a merely arbitrary decision can exclude it here, the existence of the partnership contract, and an acting under it in the way supposed, being assumed? Nor do I see, on the same hypothesis, how, in principle, I can refuse to apply to this case the reasoning in *Forster v. Hale*. It is, without doubt, a gross moral fraud for a vendor who has got his purchase-money to withhold the conveyance, but payment of purchase-money will not take a case out of the Statute. So, in *Forster v. Hale*, the advances made by the bankers, and accepted by *Burdon* together with other persons in the colliery, would have made it a gross moral fraud in him to deny the interest of his partners in the bank in the lease; still it was merely an advance of money, and though the banker's books in that instance made the case plain, that consideration affects

only the weight of the evidence, and not the question of its admissibility. It is clear, moreover, that *Lord Rosslyn* founded himself entirely upon the proposition, that the existence of the partnership drew with it the right to have the stock of the partnership, whether land or other stock, ascertained; and though in one part of his judgment he observes that an estate in the land is not necessary to, and often does not accompany, the interest of partners in a mine, his argument throughout is founded on the partnership contract and the consequences incident to it. A contract between *Burdon* and a single individual, that that individual should have all *Burdon's* interest in the colliery, could not have been enforced. It was the partnership, and nothing else, which was the foundation of *Lord Rosslyn's* judgment. Difficult, however, as the proposition is, it derives some support by way of analogy (though I admit a distinction may be taken between them) from the cases which were referred to and acted upon by *Lord Cottenham*, in *Taylor v. Salmon* (*a*), in which case, upon proof of agency, it was held, that a trust attached on land purchased by the agent, though he denied the agency. Here, in principle, the partner purchasing land for the use of his firm may be considered as the agent of his firm, in order to bring the case within the principle of the cases I have referred to (*b*).

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But it is said that no such partnership as the bill alleges, and as I have up to this time assumed, is proved in this case,—and as against the devisees of *M^r Adam*, it is true that there is no such proof. The question before me does not however rest there; there is this further question,—whether there is not enough proved to entitle the Plaintiff to an issue upon that point?

(a) 4 Myl. & Cr. 139.

(b) See Sugden, Vend. and Pur., p. 46, pl. 8, ed. 11.

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An agreement between B. and C. was communicated by one of the parties to A., after applications in writing from A. for the signature of the other parties to a memorandum expressing his interest as a partner in the transaction relating to the land, the subject of the agreement, and the Court held, that the agreement so communicated must be taken, not as an original proposal, but as an acknowledgment of a pre-existing right in A.; and that A. might avail himself of the acknowledgment, notwithstanding the agreement between B. and C. was *res inter alios acta*, and notwithstanding A. objected to some of the terms in that agreement, as not truly expressing his partnership contract.

Now, first observe the memorandum of the 27th of October, 1843. Two objections were taken by the Defendants to that document; one, that it was *res inter alios acta*, upon which *Garrard v. Lord Lauderdale* (a) and cases of that class were mentioned; and the other, that the Plaintiff, upon the document being tendered to him, had rejected it, and that he could not again insist upon it. One observation appears to me to answer both of these objections. If the document were in the nature of a voluntary instrument, containing an offer to a person neither having nor claiming any precedent interest, either objection might possibly prevail. But that is not the case here. In order rightly to understand the effect of the document, I am bound to place myself by evidence in the position of the parties making, delivering, and receiving it. Now, from the beginning, the Plaintiff had been insisting in writing upon the rights which he now claims, and pressing *M^cAdam* to furnish him with written evidence of his rights. I refer to the Plaintiff's letters to *M^cAdam*, and to the memorandum of agreement sent by him to *M^cAdam* for his signature. When, therefore, *M^cAdam*, under these applications, gives the Plaintiff the document of the 27th of October, 1843, I must understand him as giving it, not as an original proposal, but as an acknowledgment of the pre-existing right, which the Plaintiff claimed, and the Plaintiff does not lose the benefit of that acknowledgment, so far as it goes, because he complains, and perhaps truly, that it gives him less than he is entitled to.

The admission in *Hamilton's* answer carries the case much further against him; for what *M^cAdam* said to him before he made his bargain with *M^cAdam*, and paid

(a) 3 Sim. 1.

an admission by *M^r Adam* of
 the land, and therefore binding
 have been evidence against
 evidence against *Hamilton*,
 by a conveyance subsequent
 admission in the answer is not
 devisees, because the an-
 be read against the other.
 at by the Plaintiff are not
 Frauds; but if the ques-
 the Plaintiff had an inter-
 claim, repeatedly made,
 is a circumstance of no
 depends on the Statute
 at the cases I have refer-
 of which the Plaintiff

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to be noticed: First,
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 ation for the original
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a,—want of consider-
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 hat there is a good
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 g has been done,—

H. W.

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it appears to me, that all that was required of the Plaintiff had been done up to the time that the dispute arose; at all events, enough had been done to subject him to a suit if a loss had been incurred; and if so, it must follow of course that he has done enough to entitle him to sue if a profit has been made, and the case is right in other respects: in fact, it appears to me, that, up to the time of the dispute, he had done every thing that could be required of him to be done; though the time for the most important part of his services may not have arisen. Nor can I say that the Plaintiff's removal to *Cheltenham* precludes him from continuing to act on behalf of the parties according to the terms of the contract, although it may involve him in more expense than if he resided at *Birkenhead*. It is not suggested that any benefit has been lost up to this time by his absence. It appears to me a strange proposition for the Defendants to say, that the Plaintiff has no right under the contract, and yet that he shall remain at *Birkenhead* with his right denied, until the Court shall have come to a conclusion on the subject. I do not think that there is any thing in this objection absolutely to deprive him of all benefit of the contract, if he is in other respects entitled to it.

The difficulty of the case has led me to look into that which I may call the second branch of it. The Plaintiff says, if the case is within the Statute of Frauds, that still a trust is sufficiently "manifested and proved" by the memorandum of the 27th of October, 1843; and though he objects to the terms of that instrument, so far as it excludes him from a voice in the business, as to the time of selling the land, he prefers taking such rights as the document may give him to having his bill dismissed. For the reasons I have already stated in commenting upon that document, I think the memo-

randum is an acknowledgment of an existing right, and does at least manifest and prove an interest in the Plaintiff to the extent therein specified.

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It was then said, that the interest of the Plaintiff, if any, had not yet ripened into a right in possession, and therefore that the bill is premature. I am not yet persuaded that such is the case. It may be argued, from *Peck v. Cardwell*, that an agreement, like that in question, is not determined by the death of one of the parties; an argument which, in one sense, is unfavourable to the Plaintiff. But if that conclusion be admitted, it must follow that the agreement between the parties binds them to sell at the proper time, whenever that may be; and the question which I have considered is, whether the attempt at partition will not, if carried out, so completely destroy that unity and entirety of interest, which is essential to the due performance of the original contract, that the Court is bound at least to prevent it; or whether that circumstance, coupled with the unqualified denial of the Plaintiff's interest, and his actual exclusion from the land, is not such a determination of the original contract, as will entitle him now to an immediate sale. I have found, however, after giving to each branch of the case the best consideration I can, so great difficulty in the way of a decision founded upon this second branch of it, that I think I shall best consult the interests of both parties, and the justice of the case, by directing such issues as will try whether any such an agreement as is alleged, was entered into between the Plaintiff and *M'Adam*, before the 16th of October, 1843; and if such an agreement was made, whether it contained the term excluding the Plaintiff from any voice in the determination of the time for selling the land. I mention the 16th of October, 1843, which is later than the time at which it is alleged that

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the original agreement was made, in order to cover the real justice of the case, and on the authority of what is said throughout the case of *Forster v. Hale*,—that if the evidence does not prove the agreement at the beginning, it is sufficient that it is subsequently shewn.

Decree.

THIS Court being desirous of having the following questions of fact decided by a jury, namely,—First, whether, before the 16th day of October, 1843, it was agreed between the Plaintiff and *Robert M'Adam* (in &c., deceased), that they should be jointly concerned in speculations, or a speculation, for buying, improving for sale, and selling land at *Birkenhead*, in the county of *Chester*; Secondly, whether, if any such agreement was made, it was a term in such agreement that the Plaintiff should have no power or authority in determining when the land purchased in pursuance of the said agreement should be resold,—It is ordered, that a writ of summons be issued out of her Majesty's Court of Common Pleas by the Plaintiff against the Defendants, pursuant to the provisions of the statute in that case made and provided. And it is ordered, that the parties do proceed to a trial under the said writ of summons, at *Liverpool*, at the next assizes for the Southern Division of the county of *Lancaster*. And it is ordered, that the Plaintiff in Equity be the affirmant in the first of the said issues. And it is ordered, that the Defendants in Equity be the affirmants in the second of the said issues; and the Plaintiff in Equity is to be at liberty, if he shall think fit, to examine the Defendant, *Robert Hamilton*, as a witness upon the said trial; and the Defendant, *Robert Hamilton*, is to attend and be examined accordingly, upon receiving notice that the Plaintiff in Equity intends to avail himself of the liberty hereby given. (Production by the Defendants at the trial of all documents admitted by their respective answers, &c., which have been given in evidence in the cause; and to admit upon the trial of such issues that the documents admitted by the answer of the executors of *Robert M'Adam* to be in their custody, came into their custody among the papers of the said *Robert M'Adam* after his death, in their character of his executors, and are produced out of such custody. Further directions and costs reserved. Liberty to apply.)

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COCKSEGE v. COCKSEGE.

27th & 30th

June.

3rd July.

A BILL, by a married woman and her father, who was also her next friend, against the husband and his assignees, for the specific performance of articles for a settlement, entered into before the marriage, such articles providing for an annuity to the intended wife, in the event of a separation during the lives of the husband and wife. The articles are fully stated below (a); and also in Mr. Simons' Reports, Vol. 14, p. 244. The cause now came on for hearing,—

Whether an ante-nuptial contract, whereby the intended husband agreed to secure to the intended wife an annuity for her separate maintenance, in the event of his death, or any separation taking place between them during their lives, is void; and if not, whether such contract is valid so far as it is intended to secure an annuity to the wife in case of a separation or divorce for any cause; or whether it is valid to the extent of securing the annuity to the wife in case of desertion by the husband, or divorce without misconduct on the part of the wife; or whether it is valid only to the extent of securing the annuity to the wife in the event of her surviving the husband—*quære*.

Mr. *Tinney* and Mr. *Tennant*, for the Plaintiff.—The present case is distinguished from the reported cases, by the fact, that the settlement was not made after marriage, but was entered into before the marriage; and by another fact, that the husband (under whom the assignees claim) was of full age and *sui juris* when he entered into the contract, and the Plaintiff was then an infant. On the first point, the marriage having been made upon the faith of the settlement, if the Court does not carry the settlement into effect, the result will be, that one party will have had the advantage of the marriage contract; and as to the other, the contract will have failed: for by withholding its aid the Court does not leave the parties in the same situation in which they were previously to the contract; nor can it restore them to that situation. The effect of a decision, that the agreement for the settlement cannot be performed, will be either that the contract has been a fraud upon the wife, or that it has been entered into under a mistake as

(a) *Infra*, p. 402, n., Case for the opinion of the Court of Common Pleas.

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to the law: in either of those cases, the wife is entitled to have the settlement rectified, and made according to the intention of the parties, or according to the contract which was made for her benefit, to the utmost extent to which it can be lawfully executed. These are reasons for the relief in this case. Then, what are the objections? All the objections which have been raised in cases of deeds made subsequent to marriage, are mere dicta when applied to the case of a settlement prior to marriage. What is there unlawful in a father absolutely refusing his consent to the marriage of his infant daughter, unless the proposed husband will agree to settle an annuity, for her separate use, from the time of the marriage, so long as she lives? And if the husband consents to these terms, but stipulates that so long as the lady shall live with, and be maintained by him, the annuity shall not be payable, and the father agrees to that qualification, what is there still to make the contract unlawful? *Hoare v. Hoare* (a). Why may not provision be made for lawful separation in case of misconduct on the part of the husband? Suppose it were provided, that if from any cause the wife should become entitled, by the decree of the Ecclesiastical Court, to alimony, that alimony should be of a certain amount, and be secured in a certain manner, what is there to make such a provision unlawful? The objection of policy does not apply, for the contingency which is contemplated can only happen from the conduct of the husband, and cannot be brought about by the act of the wife, for whose benefit alone the provision is made. Why may not the father in this manner guard himself against the possibility of having, at some future time, the maintenance of his married daughter cast upon him? *Rodney v. Chambers* (b), *Chambers v. Caulfield* (c). On

(a) 2 Ridg. P. C. 268.

(b) 2 East, 297.

(c) 5 East, 244.

the second point,—that of the infancy of the Plaintiff at the time of the contract,—the Plaintiff claims the right of repudiating any part of the provisions in the articles (if any there be), which from mistake or fraud shall not be capable of execution; and seeks such a decree from the Court as will carry into effect the articles, so far as they lawfully may be performed. The Court may mould the settlement so as to give the Plaintiff the stipulated provision in case of desertion by the husband, or any other separation proceeding from no misconduct on her part.

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 v.
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Mr. Romilly and Mr. Prendergast, for the Defendants.
 —The circumstances that the settlement in this case was made before the marriage, and that the Plaintiff was an infant, do not remove the legal objections to the contract, or give it validity. The policy of the law is opposed to deeds providing for the event of future separation: *Durant v. Titley* (a), *Hindley v. Westmeath* (b), *Westmeath v. Westmeath* (c), *Wilson v. Mushett* (d), *Jee v. Thurlow* (e). In *Moore v. Moore* (f), which was the simple case of a settlement of £100 a year as pin-money, for the separate use of a married lady, separation not being adverted to or contemplated by the settlement, Lord Hardwicke said, "These separate maintenances are not to encourage a wife to leave her husband, whatever his behaviour may be; for was this the construction, it would destroy the very end of the marriage, and be a public detriment" (g); and in another part of his judgment on the same case, he adds, "I am afraid these separate provisions do often occasion the very evils they are intended to prevent" (h).

(a) 7 Price, 577.

(b) 6 B. & C. 200.

(c) Jac. 142.

(d) 3 B. & Adol. 743.

(e) 2 B. & C. 551.

(f) 1 Atk. 273.

(g) Id. 276.

(h) Id. 277. The following note, of a case argued at Lincoln's Inn, in the early part of

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By the subsequent marriage, the parties became, with reference to this clause, in a condition analogous to that

the year 1840, presents a somewhat curious example of the operation of a trust for the separate use of a married woman, especially when compared with the observations of Lord *Hardwicke*, cited above.

GREEN v. GREEN.

THE bill, which was brought by *Ann Green*, wife of *Samuel Francis Green*, by her next friend, against the said *Samuel Francis Green* and others, stated, that, by an indenture, dated the 8th of June, 1836, being a settlement made in contemplation of the marriage of the Plaintiff and her said husband, certain leasehold premises in *Whiting-street*, *Thomas-street*, and *Little Thomas-street*, *Lambeth*, and certain furniture, fixtures, and effects, were bargained, sold, and assigned to *Thomas Britchford* and *Allan M'Millan*, upon trust for the sole and separate use of the Plaintiff, notwithstanding her then intended coverture, for her life, with remainder for the said *Samuel Francis Green*, for his life, with remainders to certain other persons. That the marriage took place on the 21st of June, 1836. That *Samuel Francis Green* and the Plaintiff had for some time past, by reason of improper conduct on the part of the said *Samuel Francis Green*,

lived separate and apart from each other. That *Samuel Francis Green*, without the consent of the Plaintiff, had entered into receipt of the rents and profits of the settled premises, had distrained the goods of some of the tenants, and had possessed himself and sold and disposed of some of the furniture and effects, and had applied such rents and proceeds to his own use; that he had also taken possession of the house, No. 2, *Whiting-street*, and threatened in like manner to possess himself of a sum of £30 belonging to the Plaintiff, in the *Lambeth Savings Bank*, being part of the settled property.

The bill prayed an account of the trust property, furniture, and effects, possessed by the Defendant, *Samuel Francis Green*, and that he might be decreed to pay into Court what should be found due from him,—that the Defendant, *Samuel Francis Green*, might be restrained by injunction from taking proceedings to recover or receive the rents and profits of the trust property, or otherwise intermeddling or interfering with the trust estates, furniture, and effects, and from continuing in possession of the house, No. 2, *Whiting-street*. The bill also prayed that new trustees might be appointed, and, in the meantime, for a receiver.

of persons who, after a post-nuptial deed, providing for separate maintenance, have been reconciled, and lived

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The Plaintiff, upon affidavit, obtained an injunction, (Nov. 4th, 1839), restraining the Defendant, *Samuel Francis Green*, and his agents, from receiving or taking any proceedings to recover possession of the money in the Savings Bank, or the interest thereof, and from taking any further and other proceedings, by distress or otherwise, against the tenants or occupiers of the pieces or parcels of ground, messuages or tenements, hereditaments, and premises, or other the trust estates, and from receiving the rents and profits thereof, or otherwise intermeddling or interfering with the trust estates, furniture, effects, monies, and premises; and from continuing in possession of the house and premises, No. 2, *Whiting-street*, until answer or other order.

The Defendant, *Samuel Francis Green*, by his answer, said, that an indenture of settlement had been executed previous to his marriage with the Plaintiff, merely to obviate the interference of other persons, but that it was agreed between himself and the Plaintiff that after the marriage it should be destroyed. He said, that immediately after the marriage he had entered into possession or receipt of the rents of the property; that the property had been rated in his

name in the parochial books; that he had caused distresses to be levied on tenants for non-payment of rent; and that he had possessed himself of the furniture and effects, and occupied the house, No. 2, *Whiting-street*, where the Plaintiff resided, with her consent and concurrence; but he denied that he had sold or disposed of any part of the furniture or other property. The Defendant, after putting in his answer, moved to dissolve the injunction.

Mr. *Dixon*, for the motion, insisted that the injunction, in restraining the husband from continuing in possession of the house in which the wife resided, and from interfering with the furniture comprised in the settlement, operated as a divorce *à mensa et thoro*; and that in no case had the Court carried a trust for separate use to that extent.

Mr. *Bilton*, contra, cited *Newlands v. Paynter* (a).

The VICE-CHANCELLOR OF ENGLAND said, that this Court had only to consider whether a trust for the separate use of the wife was created. There was nothing unlawful in the settlement, and he saw nothing to prevent the Court from protecting the interests of the parties under it. If the injunction

(a) Since reported: 4 Myl. & Cr. 408.

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 v.
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 —
 Argument.

together, in which case the separation deed ceases to have effect: *Lord St. John v. Lady St. John* (a). The Court cannot separate the provisions which may be lawful, from those which are unlawful, for this would be to make a new contract between the parties: *Shackell v. Rosier* (b).

In *Rodney v. Chambers* (c), the separation which was contemplated was, a separation to take place with the consent of trustees. The same approbation was necessary under the deed which came into question in the case of *Chambers v. Caulfield* (d). The authority of *Hoare v. Hoare* (e) has been denied: *Jones v. Waite* (f).

Judgment.

The VICE-CHANCELLOR, without expressing any opinion on the question, directed a case for the opinion of a court of law on the several points.

Case.

Thomas Martin Cocksedge, was in, and prior to, the year 1837, and has ever since been, and now is, seised of certain estates, producing a net rental of £400 a year and upwards.

Prior to the 13th day of September, 1837, a marriage being proposed between the said *Thomas Martin Cocksedge* (who was then of full age) and *Ann Whale*, (who was then under the age of twenty-one years), in consideration of the said intended marriage, a certain indenture or articles of agreement was or were duly signed, sealed, and delivered, by the said *Thomas Martin*

had the effect attributed to it, a question which he could not determine, the husband would not be without his remedy in the Ecclesiastical Court.

Motion refused, with costs.
 —*Repr. MS.*

(a) 11 Ves. 537.

(b) 2 Bing. N. C. 634.

(c) 2 East, 297.

(d) 6 East, 244.

(e) 2 Ridg. P. C. 268.

(f) 7 Scott, 338. Per Lord

Denman.

1848.

Cocksedge
v.
Cocksedge.
Case.

Cocksedge and *Ann Whale*, and by *William Whale*, her father, in the presence of, and attested by, two witnesses, and the same were as follows (that is to say), Articles of Agreement made, intended, concluded, and agreed upon this 13th day of September, 1837, between *Thomas Martin Cocksedge*, of the Mount, Bury St. Edmunds, in the county of Suffolk, Esquire, of the first part, *Ann Whale*, daughter of *William Whale*, of Billericay, in the county of Essex, innkeeper, of the second part, and the said *William Whale*, the father, of the third part. Whereas a marriage is intended to be shortly had and solemnized between the said *Thomas Martin Cocksedge* and the said *Ann Whale*; and whereas, in contemplation of, and in negotiation of, the said intended marriage, it has been proposed and agreed by and between the said parties, that he, the said *Thomas Martin Cocksedge*, should and would confirm to the said *Ann Whale* an adequate annual sum as and for the maintenance of her, the said *Ann Whale*, to be enjoyed by her, the said *Ann Whale*, independently of all control of him, the said *Thomas Martin Cocksedge*, in the event of any separation taking place between the said *Thomas Martin Cocksedge* and the said *Ann Whale* during their lives; or in case the said *Ann Whale* should survive him, the said *Thomas Martin Cocksedge*, to be enjoyed by her, the said *Ann Whale*, during her natural life, free from the control of any future husband. Now this indenture witnesseth, that for and in consideration of the said intended marriage, he, the said *Thomas Martin Cocksedge*, for his heirs, executors, and administrators, hath covenanted, promised, and agreed, and doth hereby covenant, promise, and agree, with and to the said *William Whale*, the father of the said *Ann Whale* (who is an infant, under the age of twenty-one years), that he, the said *Thomas Martin Cocksedge*, shall and will, immediately after the solemnization of the said intended marriage, or so soon afterwards as conveniently may be after such solemnization, make and execute an effectual settlement in the law in favour of the said *Ann Whale*, and thereby to secure to the said *Ann Whale* payment of the annual sum of £400, to be paid to her by equal quarterly payments on the four usual quarter-days in the year; and in the event of the death of the said *Thomas Martin Cocksedge*, or any separation taking place, the first payment thereof to be made on the first of such days then next following the occurrence of such event, and to be free from the debts, control, or engagements of any future husband, but the receipt of her, the said *Ann Whale*, to be a sufficient discharge for the same, without her said husband (if any) joining therein; and that he, the said *Thomas Martin Cocksedge*, shall thereby charge with the payment thereof some one of the estates of him, the said *Thomas Martin Cocksedge*, of ample value, held by him in fee simple; and

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 —
 Case.

also that he, the said *Thomas Martin Cocksedge*, shall by deed create a term of 1000 years in such freehold estate to the trustees of such settlement, one of which it is hereby agreed shall be the said *William Whale*, with full power to them, the said trustees, in the event of non-payment of the said sum of 400*l.* at the days and times and in manner aforesaid, to mortgage or sell the same, for the purpose of satisfying such annual payment, and with all other usual powers, provisoes, conditions, and covenants. And the said *Thomas Martin Cocksedge* doth also, in manner aforesaid, covenant, promise, and agree, with and to the said *William Whale*, that for the purpose of carrying into effect this agreement, he, the said *Thomas Martin Cocksedge*, shall and will, at all times hereafter, make, do, and execute, all such acts, deeds, matters, and things, as shall be necessary, and shall be required by the said *William Whale*, by and with the advice of his counsel in the law. In witness whereof the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

Shortly after the time when such articles of agreement were so signed as aforesaid, the said *Thomas Martin Cocksedge*, and the said infant, *Ann Whale*, were, (with the consent of the said *William Whale*), duly married.

The said infant has since attained her age of twenty-one years.

In the month of December, 1843, the said *Ann Cocksedge*, by the said *William Whale*, as her father and next friend, and the said *William Whale*, filed their bill in her Majesty's High Court of Chancery in *Westminster*, against the said *Thomas Martin Cocksedge* and another, as Defendants, which bill was afterwards duly amended; and it was thereby prayed (amongst other things) that the said articles of agreement might be specifically performed and carried into execution under the direction of the Court. The said cause came on to be heard on the 30th day of June, 1845, before his Honor the Vice-Chancellor Sir *James Wigram*, when his Honor was pleased to order that a case should be made for the opinion of the judges of her Majesty's Court of Common Pleas, and that the questions upon that case should be—

First, whether the covenant contained in the said articles is or is not altogether void; and if not,

Secondly, whether the covenant or agreement in the said articles contained, for making and executing a settlement in favour of the said *Ann Cocksedge*, is or is not void, so far as it purports

to bind the said *Thomas Martin Cocksedg* to secure to the said *Ann Cocksedg* the annual sum of 400*l.*, in the event of her surviving him.

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—
Case.

Thirdly, whether the said covenant or agreement, so far as it purports to bind the said *Thomas Martin Cocksedg* to secure the annual sum of 400*l.* to the said *Ann Cocksedg* in the event of any separation taking place, is or is not altogether void; and if not,

Fourthly, whether the said *Thomas Martin Cocksedg* would be liable at law under the said covenant, upon the event of the said *Thomas Martin Cocksedg* and *Ann Cocksedg* ceasing to cohabit as man and wife for any cause; and if not,

Fifthly, whether the said *Thomas Martin Cocksedg* would be liable at law, under the said covenant, to secure to the said *Ann Cocksedg* the annual sum of 400*l.*, upon the event of the said *Thomas Martin Cocksedg*, without lawful cause, deserting, or refusing, or ceasing to cohabit with the said *Ann Cocksedg*; and if not,

Sixthly, whether the said *Thomas Martin Cocksedg* would be liable at law, under the said covenant, to secure to the said *Ann Cocksedg* the annual sum of 400*l.* upon the event of a separation by sentence of divorce *à mensa et thoro*, by a court of competent jurisdiction, such sentence not being founded on any offence or misconduct of the said *Ann Cocksedg*.

Seventhly, whether the said *Thomas Martin Cocksedg* would be liable at law, under the said covenant, to secure to the said *Ann Cocksedg* the annual sum of 400*l.* upon the event of the said *Ann Cocksedg*, without lawful cause, deserting or refusing, or ceasing to cohabit with the said *Thomas Martin Cocksedg*; and if not,

Eighthly, whether the said *Thomas Martin Cocksedg* would be liable at law, under the said covenant, to secure to the said *Ann Cocksedg* the annual sum of 400*l.* upon the event of a separation, by sentence of divorce *à mensa et thoro*, by a court of competent jurisdiction, such sentence being founded on the misconduct of the said *Ann Cocksedg*.

The case has not been argued at law.

1846.

20th January,
and 8th May.

A bequest for the assistance of Unitarian congregations held to be valid, and the trust directed to be carried into execution.

Statement.

SHREWSBURY v. HORNBY.

RICHARD COOKE, by his will, dated the 31st of August, 1837, after giving his wife a government annuity of 300*l.* for her life, appointed *Thomas Hornby*, the treasurer of the Unitarian Association, or the treasurer of such association for the time being, trustee of that annuity, with a request that he and his committee would give to the Unitarian chapel at Devonport 100*l.* a year during the continuance of the said annuity, and that the remaining 200*l.* a year might be applied, in sums of 20*l.* annually, to the assistance of respectable Unitarian congregations who stood in need of it. After some other bequests, charged on his leasehold property at Bath, the testator gave the said leasehold property to the said *Thomas Hornby*, in trust for himself and the committee of the Unitarian Association, to be converted into money as soon as convenient, and the produce to be applied in supporting "a Unitarian missionary, on something like the plan of the late excellent missionary, Mr. *Wright*. Should those Unitarian bequests be attacked as illegal, or should they be declared void," then all the testator had given to the Unitarian Association he gave to the Plaintiff, her sister, and their children, as thereby directed,

The bill submitted, that not only was the bequest of the leasehold estate for charitable purposes void, but doubts had arisen, "whether the other bequests for the benefit of Unitarians, and for a Unitarian chapel, Unitarian congregations, and a Unitarian missionary, were not illegal and void, as being gifts to, or for the benefit of, or to promote or encourage, a religious sect

who impugn and deny the doctrine of the Trinity and the Godhead of Christ,"

1846.
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v.
HORNBY.
Statement.

The Defendant *Hornby* by his answer said, that, save that the gift of the leasehold property for the Unitarian mission was void under the mortmain act, he submitted that there was no reasonable ground for holding or considering the bequests for Unitarian objects illegal or void for the reasons stated in the bill, or justifying any doubt or question to that effect; and that the bill ought not to have raised any such doubt or question,

Mr. Romilly, for the Plaintiff.

Argument.

Mr. *Schomberg* argued that the bequest for the purpose of propagating or teaching Unitarian doctrines was illegal. In the case of the *Attorney-General v. Shore* (a) the question did not distinctly arise; and there was nothing in that case to establish the validity of such a gift. It formed the sixth question proposed to the judges on that occasion (b), but the answers to the other points by several of the judges rendered the answer to that question unnecessary. The legality of such gifts has been doubted by the highest authority: *Attorney-General v. Pearson* (c). The gift over, in case of the charitable disposition being void, therefore took effect: *De Themmines v. De Bonneval* (d).

Mr. *Spence*, Mr. *Evans*, and Mr. *Faber*, for other parties.

Mr. *Wray*, for the Attorney-General.

(a) 11 Sim. 592.

(c) 3 Mer. 353.

(b) See 11 Sim. 616.

(d) 5 Russ. 288.

The VICE-CHANCELLOR held, that the bequest of the Government annuity of 300*l.* to the Defendant *Thomas Hornby*, upon the trusts mentioned in the will, subject to the life interest given to the widow, was a valid bequest, and ought to be carried into execution.

27th & 28th
May, and
2nd of June.

HOLE v. PEARSE.

UNDER an indenture of lease, dated the 10th of March, 1823, granted by the Bishop of *Exeter*, *Margaret Southcomb*, *Lewis Southcomb*, and *Hugh Northcote*, were seised to them, and their heirs and assigns, of the manor of *Bishops Nympton*, in the county of *Devon*, for the lives of *Ann Lewis Northcote*, *William Hole*, and *Lewis Southcomb*, and of the survivors of them, subject to the rents and conditions therein mentioned. By an indenture dated the 16th of April, 1823, the said lessees covenanted and agreed to stand seised of the manor in trust as to three undivided eighth parts to the use of or in trust for *Margaret Southcomb*, her heirs and assigns; as to one other undivided eighth part to the use of or in trust for *Lewis Southcomb*, his heirs and assigns; and as to the remaining four-eighth parts, to, upon, and for such uses, trusts, and purposes, as were declared by the will of *Ann Southcomb*, deceased, and which trusts title of *B. and C.* to the manor, was subsequently impeached, and pending the trial of their right to the manor, they were unable to grant the copy of court-roll according to the agreement. *M.* thereupon brought three several actions, upon the bond, against the Plaintiff, *B.* and *C.* respectively. The Plaintiff, *B.* and *C.* entered into a consolidation rule, whereby they all consented to be bound by the verdict in one of the actions. The Plaintiff then filed his bill against *B.*, *C.* and *M.* for a specific performance of the contract by *B.* and *C.*, and to restrain the action brought by *M.*:—*Held*, that the question as against *M.* was the same both at law and in equity, and that after having consented to be bound by the verdict in the action, the Plaintiff could not sustain the suit, and the bill was dismissed without prejudice to any question of contribution or indemnity as between the Plaintiff, *B.* and *C.*, the obligors in the bond.

were for the separate use of *Ann Lewis Northcote* for her life, with remainder for such persons as she should by deed or will appoint; remainder in default of appointment in trust for the heirs, executors, &c. of *Ann Lewis Northcote*. *Margaret Southcomb*, by her will, dated in October, 1823, devised her three eighth shares of the manor in trust for *Susanna Southcomb*.

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HOLE
v.
PEARSE.
—
Statement.

In August, 1832, *Hugh Northcote*, and *Ann Lewis* his wife, *Lewis Southcomb*, and *Susanna Southcomb*, contracted with *Thomas Maunder*, in consideration of the sum of £210, to grant unto *Thomas Maunder*, after the determination of the widowhood estates of *Fanny Hill*, and *Mary Rodd*, widows, then subsisting thereon, a copy of court roll of the manor (according to the custom) of the grist mills, and premises, called *Bish Mills*, and *Bish Mill Cottages*, held of the manor, for the lives of *Thomas Maunder* and *George Maunder*, and of the survivor of them; and as a security for the performance of such agreement *Hugh Northcote*, and *Ann Lewis* his wife, *Lewis Southcomb* and *Susanna Southcomb* severally made, executed, and gave to *Thomas Maunder* their bond, dated the 17th of August, 1832, whereby they severally bound themselves, their and each and every of their heirs, executors, and administrators, unto *Thomas Maunder*, his executors, administrators, and assigns, in the sum of £800, with the condition, that if *Hugh Northcote*, and *Ann Lewis* his wife, *Lewis Southcomb*, and *Susannah Southcomb*, and their respective heirs, executors, administrators, and assigns, and all others lawfully claiming by, from, under, or in trust for them, or any or either of them, should within six months next after the expiration of the widowhood estates of *Fanny Hill* and *Mary Rodd*, grant unto *Thomas Maunder*, his heirs, executors, administrators, or assigns, a copy of court roll of the

manor of *Bishops Nympton*, of the said grist mills, cottages, and premises, for the lives of *Thomas Maunder* and *George Maunder*, and the survivor of them, and suffer any widow or widows of them to hold and enjoy the said premises for their widowhoods, then the said obligation to be void, or otherwise to remain in full force.

By indentures of lease and release of the 28th and 29th of September, 1836, duly acknowledged, *Hugh Northcote* and *Ann Lewis* his wife, in consideration of £4500, released and conveyed their four eighth parts of the manor to the use of *Lewis Southcomb*, for all their estate therein created by the said indenture of lease of 1823, subject to the agreement and bond entered into with and given to *Thomas Maunder*, and all other agreements and bonds entered into with and given by the said parties, for granting copies of court roll of tenements holden of the manor. And *Lewis Southcomb* thereby covenanted to indemnify *Hugh Northcote* and *Ann Lewis* his wife, and, so far as his estate and interest in the manor should enable him, to complete and give effect to the agreement and bond entered into with and given to *Thomas Maunder*, and all other agreements and bonds for granting copies of court roll according to the custom of the manor. By indenture, dated in March, 1838, *Lewis Southcomb* conveyed the manor and premises to *I. G. Pearse* and others, their heirs and assigns, upon trust for certain creditors, and subject thereto upon trust for *Lewis Southcomb*, his heirs and assigns. *Hugh Northcote* survived *Ann Lewis* his wife, and died in July, 1839, having appointed the Plaintiff his executor.

Fanny Hill survived *Mary Rodd*, the other *cestui que vie* of the grist mills and premises, and died in

August, 1842. *Thomas Maunder* thereupon applied for the performance of the contract for the grant of the copy of court roll of such premises. The contract not being performed, *Thomas Maunder*, in February, 1844, brought three actions of debt upon bond,—against the Plaintiff, as the executor of *Henry Northcote*, and against *Lewis Southcomb* and *Susanna Southcomb*. The three actions were consolidated, by Judge's order, made the 1st of March, 1844,—proceedings in the actions against the Plaintiff and *Lewis Southcomb* being thereby stayed until after trial of the action, *Susanna Southcomb*, the Plaintiff and *Lewis Southcomb*, thereby undertaking to be bound by the verdict in such actions; but *Thomas Maunder*, the Plaintiff in such actions, was to be at liberty to proceed against the Plaintiff and *Lewis Southcomb*, as he should think fit.

The bill, which was filed against the parties to the creditors' deed of March, 1838, and *Lewis Southcomb* and *Susanna Southcomb*, and also against *Thomas Maunder*, charged, that the other Defendants, before execution of the deeds of 1836 or 1838, had not assented to the agreement to grant the copy of court roll of the premises to *Thomas Maunder*, and also of the bond for the performance of the agreement; and the bill prayed that the Defendants, the parties to the deed of 1838, might be decreed to grant the copy of court roll of the premises to the Defendant, *Thomas Maunder*, pursuant to the agreement, and that the Defendants, *Susanna Southcomb* and *Lewis Southcomb*, might be decreed to make, or procure to be made, the grant on their parts, and as to their interests in the manor; and that *Thomas Maunder* might be decreed to accept such grants, and might be restrained from proceeding in the action upon the bond.

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HOLE

v.

PEARSE.

Statement.

The Defendants *Pearse* and others, the parties to the deeds of March, 1838, denied notice of the agreement or bond. The Defendant *Thomas Maunder* said he had sustained damages by the non-performance of the agreement, having been unable to obtain the legal estate, or recover rents, or grant leases of the premises. The answer of *Maunder* also stated, that he had recovered in the action upon the bond. It also appeared by the answers, and evidence, that the Bishop of *Exeter*, by his steward or agent, had entered into possession of the mills,—that the Defendants were, owing to a dispute with regard to their title to the manor, or to the absence of such title, unable to grant the copy of court roll according to the agreement with *Maunder*; and that a suit was pending in this Court, in which the title of the Defendants to the manor under the lease was in question as between them and the Bishop.

Argument.

Mr. *Romilly* and Mr. *Sandys*, for the Plaintiff, contended that the executor of *Hugh Northcote*, who was one of the obligors in the bond, had a right to sue the other vendors, who were parties with *Hugh Northcote* to the agreement of August, 1832, in order to enforce the specific performance of that agreement, and by that means to be relieved from the obligation to *Maunder*. They cited *Fletcher v. Stevenson* (a).

Mr. *Rogers*, for the Defendants *Pearse* and others, parties to the deed of March, 1838; Mr. *Crawford*, for the Defendant *Lewis Southcomb*; Mr. *Tinney* and Mr. *Speed*, for the Defendant *Susanna Southcomb*; and Mr. *Teed* and Mr. *Dickinson*, for the Defendant *Thomas Maunder*.

(a) 3 Hare, 360.

The Defendants contended, that the Plaintiff was not entitled to the relief asked, and that the bill ought to be dismissed: that the Plaintiff had not that interest in the contract which would entitle him to sustain a suit for its specific performance: — v. *Walford* (a). It appeared, moreover, that the Defendants were, at least until the termination of the suit in which their title was in question as between them and the bishop, unable to grant the copy of court roll according to the agreement. In such a case, if the Plaintiff had been made liable under the bond, notwithstanding the agreement of the Defendants wholly or partially to indemnify him against such liability, he might be entitled to relief, as against the persons bound by that agreement,—but relief of that nature was not specifically sought in this suit; and could not be given under the general prayer, where the specific relief asked was of another description: *Hiern v. Mill* (b), *Soden v. Soden* (c). The plaintiff's right, if any, was to an indemnity against the bond, and not to specific performance of the contract.

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Mr. *Romilly* said, the intention of the Plaintiff in entering into the consolidation rule was, to bind himself only to the amount of the damages which should be recovered in the action, supposing him to be held liable, in the circumstances of the case.

VICE-CHANCELLOR:—

The question between *Maunder* and the vendors was purely a legal question, a question of damages. I do not say that the Plaintiff might not have had a

J
J₁

(a) 4 Russ. 372.

(b) 13 Ves. 119.

(c) *Ib.*

right to draw into this Court the question, whether the vendors could make a title or not. All I say is, that, admitting the jurisdiction of this Court to try the question of title or no title,—the question was a legal question, and one proper to be tried at law. It was the same question in both Courts. In this state of things, three actions were brought by the Defendant, and the bill was filed in this Court, but no injunction was applied for to stay the trial at law,—nor even to stay execution, except as to the single action against the Plaintiff. On the contrary, the Plaintiff consented to be bound by the verdict in the action against *Susanna Southcomb*. After thus consenting that the case should be tried at law, and after the trial at law, I think the administrator of one of the vendors, who has no interest in the specific performance of the contract, except as a means for avoiding the damages to which the estate of the deceased is otherwise liable, is not entitled to insist in this Court upon the legal question being tried over again.

In dismissing the bill, I shall declare that the order is to be without prejudice to the question, whether the Plaintiff is liable, as between himself and vendors, to contribute to the damages recovered by *Maunder* in the action.

THE Plaintiff was the owner of the manor of *Osgodby* and of lands in the township of *Osgodby*, in the county of *York*. The township of *Cliffe-cum-Lund* adjoined the township of *Osgodby* on the east. An ancient drain or watercourse, in the township of *Osgodby*, ran from the north and through the Plaintiff's lands, in two branches, which met in *Cliffe Common*, in the township of *Cliffe-cum-Lund*, and thence ran in an easterly direction through the latter township, and the adjoining township of *South Duffield*, continuing for some miles further until it emptied itself into the river *Derwent*.

By an Act, intituled "An Act for inclosing Lands in the Township of *Cliffe-cum-Lund*, in the Parish of *Hemingbrough*, in the East Riding of the County of *York*," (which received the royal assent on the 31st May, 1843,) reciting that there are within the township of *Cliffe-cum-Lund*, divers open and common fields, divers commons and waste lands, and divers inclosures, lands and homesteads; reciting also the title or

commissioners to set out and make such ditches, water-courses, and bridges, and in such situations, as they should deem necessary in the form, and also to enlarge, cleanse, or alter the course of and improve ditches, water-courses, or bridges, as well in and on the same ancient inclosures, or other lands in the township, as they should think fit. *Held*, that the act did not empower the commissioners to alter common lands, so as to overload an ancient drain which flowed through from another township, and thereby to obstruct the drainage of the township, to the damage and injury of the owners of such lands.

Where an act of Parliament empowers certain persons to deal with or with property in a certain place or district, or defined by a does not by express words, or by necessary implication, intended to affect the rights of other persons in other property,—true mere general words in the act as affecting the rights of strangers within the description of that with which the act expressly purports

Whether an act of Parliament is to be deemed a public act, or subjects, or merely a private act, depends upon the nature and not upon the technical consideration whether the act does or declaring that it shall be deemed to be a public act.

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 v.
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 —
Statement.

of the Lord Bishop of *Ripon*, and other proprietors of manors and lands within the township; and that the said open and common fields, and the said commons and waste lands, are, in their present state, incapable of any considerable improvement, and it would be of great advantage to the proprietors thereof, and persons interested therein, to have the same divided and inclosed, and specific parts thereof allotted to the proprietors thereof, to be held in severalty, and all rights of common therein extinguished, but that the purposes aforesaid cannot be effected without the authority of Parliament, and enacting that the General Inclosure Acts, 41 Geo. 3, c. 109, and 1 & 2 Geo. 4, c. 23, shall, so far as they are applicable, be deemed to be a part of this Act, proceeds,—

Sect. 1.

Sect. 2.

“ And be it enacted, that *Christopher Paver*, of *Pechfield*, and *Makin Durham*, of *Thorne*, both in the West Riding of the said county, and their successors for the time being to be elected or appointed in manner hereinafter mentioned, shall be commissioners for carrying this act and the said recited acts into execution; and it shall be lawful for the commissioners, and they are hereby required, to divide, allot, and inclose the said open and common fields, and the said commons and waste lands, in the said township of *Cliffe-cum-Lund*, according to the regulations and provisions contained in the said recited acts, and this act.”

Sect. 27.

“ And be it enacted, that it shall be lawful for the commissioners to set out and make such common ponds, ditches, watercourses, tunnels, banks, and bridges, of such extent and form, and in such situations as they shall deem necessary, in the lands to be inclosed, and also to enlarge, cleanse, or alter the course of and improve any of the present ditches or watercourses,

banks or bridges, as well in and over the same
as also in any ancient inclosures or other lands w
the said township, as the commissioners shall
necessary, (making such satisfaction to the propr
of such ancient inclosures or lands for the damage
thereby as the commissioners shall think just,) an
expenses of making and enlarging, altering, and cl
ing, such ponds, ditches, watercourses, tunnels, b
and bridges, when the same shall be first done in
suance of this act, if not otherwise provided for,
be raised by the commissioners in the same man
the other expenses of carrying this act into execu
but all such ponds, ditches, watercourses, tunnels, b
and bridges, shall at all times afterwards be rep
cleansed, and maintained by such persons and in
manner as the commissioners shall by their
direct, provided that no watercourse be diver
turned without the consent, in writing, of the
from whose lands the same may be diverted,
the persons into whose lands the same may be t
or to the prejudice of any person interested in
watercourse, except with his consent in writing."

The commissioners not to interfere with th
perty of the *Hull and Selby* Railway Company.

"And be it enacted, that if any person shal
himself aggrieved by anything done in pursu
this act, (except as to the allotments, and excep
such other determinations as are by the said
recited act or this act directed to be final, and
such cases wherein an issue at law shall be
hereinbefore is mentioned), he may appeal
general or quarter sessions of the peace which
held for the East Riding of the county of *Yor.*
four months next after the cause of complai

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 }
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have arisen, on giving to the commissioners, and to the party concerned ten days' previous notice in writing of such appeal, and of the matter thereof, (except with respect to the accounts of the commissioners, which notwithstanding the same shall have been examined and published as aforesaid, may be appealed against at any time within one month after the enrolment of the award, on giving to the commissioners such notice as last aforesaid), and the justices (not interested in the premises) in such sessions assembled are hereby required to hear and determine the matter of every such appeal, and to make such order therein, and to award such costs and damages as to them shall seem reasonable; and the costs and damages as to them shall seem reasonable, and the costs and damages which shall be so awarded, shall be levied by distress, and the said justices shall issue their warrant accordingly; and in case any such appeal shall appear to the said justices to be frivolous, vexatious, or without foundation, they shall award such costs to be paid by the appellant as to them shall seem reasonable, and such costs shall be levied in manner aforesaid."

Sect. 98.

"And be it enacted, that every order and determination of the said justices upon every such appeal shall be final, and shall not be removed or removable by certiorari, or any other writ or process whatsoever, into any of Her Majesty's courts of record at Westminster or elsewhere."

Sect. 100.

"Saving always to the Queen's most Excellent Majesty, her heirs and successors, and to the right reverend the Lord Bishop of *Ripon*, and to all other persons, bodies politic, corporate, or collegiate, their heirs, successors, executors, and administrators, all such estate, right, title, and interest, claim and demand,

(other than and except such as are expressly barred and compensated for, or intended to be barred and compensated for, and extinguished by this act), which they or any of them could or might have had in, to, or in respect of the lands hereby authorized to be divided, allotted, and inclosed in case this act had not been passed."

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 —
Statement.

A copy of the act printed by the Queen's printer to be admitted as evidence.

Sect. 102.

The Defendants *Paver* and *Durham*, as the commissioners appointed under the act, deemed it necessary for more effectually draining the lands to be inclosed, with a view to their improvement, to cut or make new drains in the waste lands of *Cliffe-cum-Lund*, which should carry the water, at different points in those lands, into the ancient drain or watercourse coming from the Plaintiff's lands in *Osgodby*, and in pursuance of their plan they caused a new drain to be cut and opened into the ancient drain.

The bill was filed in November, 1844, and it alleged, that, in the preceding month of September, the Plaintiff and his steward had inspected the courses of the intended new drains, and it then appeared to them, that if the new drains should be completed according to the design of the commissioners, the effect would be to impede the accustomed flow of water along the ancient drain. The bill set forth a representation, alleged to have been made by the Plaintiff to the commissioners, of the apprehended result of their new drains, and stated that the commissioners had, nevertheless, proceeded with their design, and, in accordance with their plans, had cut a deep drain in the waste land, communicating with, and of equal if not greater

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size than the ancient drain: that some of the lands to be drained by the intended new drains were situated higher than the Plaintiff's lands; that the effect of the new drains would be to introduce into the ancient drain a much larger volume of water than it was constructed to carry, and by that means to pen back and dam up the accustomed flow of water from the Plaintiff's lands; and that, in case of a heavy rain, the anticipated mischief would in a great measure occur from the new drain, even so far as it was already completed: and that, by the course of drainage proposed to be adopted by the commissioners in the lands to be inclosed, irreparable mischief would be done to the crops of the Plaintiff and his tenants. The bill prayed that the Defendants, the commissioners, might be restrained from cutting, opening, making, or completing any drains, ditches, or watercourses in the township of *Cliffe-cum-Lund*, which should empty themselves or flow into the ancient drain, and from causing or permitting water to flow into the drain already cut and made by them, so as at any time to surcharge or increase the water in the ancient drain in the Plaintiff's lands, with or by means of water flowing from any of the lands in the township of *Cliffe-cum-Lund*, or so as at any time to obstruct, force back, impede, or interfere with the free passage and flow of water from the Plaintiff's lands in *Osgodby*, along the ancient drain, in like manner as the water therefrom had theretofore been anciently accustomed to flow.

1844.

Nov. 29th.

Upon motion *ex parte*, supported by affidavits, the Court ordered the injunction to issue, restraining the Defendants, their servants, workmen, and agents, from permitting water to flow into the ancient water-course through the said drain, then lately cut by the Defendants into the same, or any other drain, so as to

obstruct the drainage of the Plaintiff's lands by means of the said ancient watercourse, in such manner as the same had theretofore been used and enjoyed by the Plaintiff, until answer, or other order;—the Plaintiff undertaking, without further notice, to appear upon any application to dissolve the injunction, on the succeeding 2nd of December, or upon notice before that day.

The Defendants moved to dissolve the injunction (a). Upon the affidavits before the Court on this motion it appeared that the water from the new drain was brought into the ancient drain, at a spot above a certain bridge, called *Lara* bridge. On behalf of the Plaintiff, evidence was given to shew that the arch of *Lara* bridge did not afford more than sufficient vent for the flow of water through the ancient drain before the additional volume of water was conducted into it; but the Plaintiff alleged that *Lara* bridge might be widened at an inconsiderable expense, and that thereby a passage for the water coming from the new drain might be obtained. Upon hearing the motion the Court directed an issue as follows:—"The Defendants, by their counsel, declining to make any alteration in the course of drainage proposed to be made by them before the Plaintiff's bill was filed, or to widen, or defray the expense of widening *Lara* bridge, (the Plaintiff by his counsel offering to consent to the bridge being so widened,) or to undertake hereafter to do any such acts, in case the same should obstruct the drainage of the Plaintiff's lands by means of the ancient watercourse in the pleadings mentioned, in such manner

(a) It has not been thought necessary to state the arguments, or judgments, in the earlier stages of this cause, as the same questions of law were again argued and considered at the hearing.

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ner as the same had been heretofore used and enjoyed by the Plaintiff,—This Court doth order, that the parties do proceed to a trial at law, at the next summer assizes to be holden for the county of *York*, before a special jury to be summoned for that purpose, on the following issue, viz.,—Whether the drainage made or effected, or intended at the time of the filing of the Plaintiff's bill to be made or effected by the Defendants, into the ancient water-course in the pleadings mentioned, will or would, if completed, to the damage and injury of the Plaintiff, obstruct the drainage of the Plaintiff's lands by means of the said ancient watercourse, in such manner as the same has heretofore been used and enjoyed by the Plaintiff. And it is ordered, that the jury have a view in case the Court before which such issue shall be tried shall think fit; and it is ordered, that the Plaintiff in this cause be Plaintiff at law, and the Defendants in this cause be Defendants at law, who are forthwith &c. And upon such trial it is ordered, that the Defendants do admit the title of the Plaintiff to lands in *Osgodby* in the pleadings mentioned; and in case the jury shall find any special matter, the same is to be indorsed on the postea."

The injunction was continued until the hearing or further order; and the motion, and the question of costs were ordered to stand over until after the trial of the issue, with liberty to apply.

Verdict.

The issue was tried at the *York Assizes*, in July, 1845, and the jury found by their verdict, that the drainage of the *Oxgangs* made by the Defendants would injure and obstruct the drainage of the Plaintiff's lands; but the drainage of the *Cliffe Low Common* would not injure or obstruct the drainage of the

Plaintiff's lands; and the Judge thereupon directed the verdict to be entered for the Plaintiff, and the special finding to be endorsed on the *postea* (a). On the 5th of August, 1845, after the trial of the issue, the Plaintiff filed his supplemental bill against the Defendants, charging that, although they had stopped up their new drain at the outlet, yet that water from the *Ozgangs* continued to flow from the new drain by other channels into the ancient drain; and unless the Defendants should be restrained from permitting or suffering the same, the Plaintiff's lands would be exposed to great injury: that such injury might be prevented by the Defendants enlarging *Lara* bridge and another bridge called *Smith's* bridge, lower down the drain, and deepening or widening the ancient drain from the point of junction with the new drain, so that the bridges and the ancient drain might be of sufficient size and capacity for the drainage of the Plaintiff's lands, as well as the new inclosures. Immediately upon filing his supplemental bill, the Plaintiff gave notice of motion to extend the injunction, and on the 19th of August the Defendants gave notice of motion for a new trial. The motions were heard in Michaelmas term. The Court held that the circumstances under which the case had been tried were not satisfactory, and that it would be proper to direct another trial, in which the parties would have the benefit of the experience that had been since had, and which would be afforded by the ensuing winter, of the actual effect of the new drain. A new trial of the issue was accordingly directed.

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1845.
 7th, 8th and
 10th Nov.
 5th Dec.

New Trial.

In the month of December, 1845, much rain fell,

*Motion for
 Commitment.*

(a) The record was afterwards lost by the Associate, in consequence whereof the *postea* and special finding of the jury were not entered or endorsed.

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and the Plaintiff's lands were flooded; whereupon he moved the Court for the committal of the Defendants for a breach of the injunction. The motion was argued by Mr. *Anderdon*, Mr. *Romilly*, and Mr. *Crawford*, for the Plaintiff; and Mr. *Kenyon Parker*, Mr. *Malins*, and Mr. *Shee*, for the Defendants.

1840.

January

18th & 23rd.

The VICE-CHANCELLOR, after the argument, and stating the proceedings which had taken place, said,—

After an injunction had been granted, restraining a Defendant from permitting a certain injurious effect to be produced by a given cause, (but not otherwise restraining any definite act) the apprehended injury took place, but the Defendants denied, to the best of their belief, that it arose from the alleged cause; and the Court, in such circumstances, refused to treat the Defendants as contumacious, until it should have been conclusively determined by a verdict at law, that the injury complained of was produced by the cause assigned.

The point made by the Defendants has been, that the flooding is not occasioned by the new drain. My opinion is, that what took place in December, does so far corroborate the verdict of the jury, as to entitle the Plaintiff to ask, that the drainage opened in April last shall not be allowed to continue in its present state until the question in the cause shall have been finally decided. The rain which then took place was no more than in ordinary seasons may be expected to occur with frequency. Two questions of form arise on this application:—First, I am asked to make an order upon motion, which will in effect compel the Defendants to undo what they have done, or to make an additional exit for the water before the hearing of the cause. Secondly, the motion is to commit a party, not for doing an act which he was in terms restrained from doing, but because a particular thing has taken place which by possibility might have taken place substantially to the same extent if the Defendants' new drain had not been made. On the first point, the acts of which the Plaintiff now especially complains, have

The verdict of a jury on the trial of one issue had found that the forbidden cause would produce the effect, but inasmuch as a new trial of the issue had been directed, the Court would not treat the verdict of the jury, on the first trial, as sufficient evidence to connect the cause with the effect, for the purpose of proceeding as upon a breach of the injunction.

been done since, and under the injunction, and therefore, if in any case it would be proper for the Court so to interpose upon motion, it would be proper in this case. The second point raises the great objection to the motion. The injunction does not in terms restrain any specific act, but only restrains the Defendants from doing acts which shall be attended with certain specified effects. Nothing which has hitherto been decided by this Court entitles the Plaintiff conclusively to say, that the injury complained of results from the Defendants' new drain. The verdict of the jury would, indeed, connect the two, as cause and effect; but I have in some sense opened that verdict, by directing a new trial. Still, if it were clear that the flooding was produced by the new drain, and that the Defendants, knowing that such was the case, permitted it to continue open, I should be bound to hold them guilty of wilful disobedience of the order of the Court. But unless I can come to the conclusion that the Defendants are not acting *bonâ fide* in telling me that, to the best of their belief, the injury complained of by the Plaintiff is not caused by their new drain, but by other causes, it would be a strong thing to treat them as contumacious, until I had first decided that which would leave them no room for doubt in the matter; it was for that reason that, on a former day, I intimated a doubt, whether I could treat the Defendants as contumacious after and pending the order I had made in November. It is, however, quite consistent with this, that, without giving any opinion upon that right, I should hold that the new drain ought not to remain until the right is decided; or, at least, until it is shewn by experience that closing the Defendants' drain will not have the effect of restoring the Plaintiff to the position he was in before the new drain was opened in April, 1845. But no such injunction has yet been granted, and the difficulty of

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Judgment.

*Second
Verdict.*

THE issue was tried a second time at the *York Spring Assizes* for 1846, and the jury found that the drainage both of the *Oxgangs* and the *Cliffe Low Common*, already done, obstructed the Plaintiff's drainage to his damage, and that the proposed drainage, both of the *Oxgangs* and *Cliffe Low Common*, when completed, would obstruct the Plaintiff's drainage to his damage, and the verdict was accordingly found for the Plaintiff.

*Motion for
Costs.*

On the 12th of June, 1846, the Plaintiff moved that the Defendants might be ordered to pay the costs of the proceedings in the cause. The cases of *Kent v. Burgess* (b), *Golden v. Ulyate* (c), *Gompertz v. Ansdell* (d), and *Malins v. Price* (e), were cited. The motion was refused.

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January 20th.
Hearing.

The cause came on to be heard. The parties did not enter into evidence. The Plaintiff read from the answer of the Defendants an admission of their design to make the new drains in question; and he relied upon the verdicts in the two issues.

Argument.

Mr. *Anderdon*, Mr. *Romilly*, and Mr. *Crawford*, for the Plaintiff.

The question in the cause has been substantially

(a) The motion was ordered to stand over, with liberty to amend the notice of motion by adding an alternative for an extended injunction, and upon the amended notice an order

was afterwards made.

(b) 11 Sim. 361.

(c) Id. 372.

(d) 4 Myl. & Cr. 449.

(e) 2 Coll. 190.

determined by the issues which have been tried was still open to the Defendants to disprove the fact of the damage, but that they have not attempted to do so. They have submitted to the finding of the jury that it is not now open to them to resist the decree on the ground which supposes that there was no question of fact to try, but a question of law alone. That was determined against them when the issues were directed: *Lewis v. Thomas* (a), *Robinson v. Lorrain* (b). Their course was to appeal from the direction of the issue: *Kent v. Burgess* (c). Supposing the argument to be still open to the Defendants, that they are entitled under the act of Parliament to maintain a drain in the manner proposed,—the answer is, that the act is a private act, and does not bind strangers; it cannot enable the Defendants to do any act which would be injurious to the rights of neighbouring proprietors who are not parties to the act. There is no declaration under the act, such as is commonly found, that it shall be deemed a public act; and, on the contrary, the preamble which provides that copies printed by the king's printer shall be evidence assumes that it is not a public act. For in that case such a provision would not be necessary. On the question of the costs of the issues directed, see *Blackburn v. Gregson* (d), *White v. Wilson* (e).

Mr. *Kenyon Parker*, Mr. *Malins*, and Mr. *Stirling* for the Defendants.

The objections to a decree are, first, that there is no evidence before the Court. The verdicts in the cases cited, and the other interlocutory proceedings will not support the decree.

(a) 3 Hare, 26.

(b) 2 Cox, 4.

(c) 11 Sim. 372, 377.

(d) 1 Bro. C. C. 420.

(e) 13 Ves. 87.

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—
Argument.

the bill at the hearing. The Plaintiff has given no evidence of his title to the lands in *Osgodby*, or of his right to the use of the ancient drain to which the suit relates. Secondly, the Defendants are empowered by the express words of the act of Parliament to make such watercourses in the lands to be enclosed, and also to enlarge, improve, or alter any of the existing watercourses, as they shall deem necessary. The effect of the injunction is, in fact, to repeal the act of Parliament in this respect. The provisions of an act for effecting a public or local improvement may often be prejudicial to individuals, but that is not an objection in law to the steps necessary for carrying the act into effect. By this act the mode of executing the necessary works for effecting the drainage of the lands to be enclosed, is subject to the discretion and judgment of the commissioners,—that judgment and discretion being of course exercised *bonâ fide*, which in this case is not disputed: *Priestley v. Manchester and Leeds Railway Company* (a). It is not said that the commissioners have acted capriciously, or that they have exercised their powers excessively, or even that they have proceeded with any want of scientific knowledge. In *Aldred v. The North Midland Railway Company* (b) it was expressly held that the defendants might execute the works authorized by the act, although the consequence would be to render a turnpike road liable to be flooded. The principle is, that, where the Legislature has authorized a public work, the parties carrying it into execution are not liable for the consequences of damage which may be thereby occasioned to individuals, so long as they do not depart from the powers given to them: *Governor and Company of the British*

(a) 2 Railway Cases, 134, 154.

(b) 1 Id. 404.

Cast Plate Manufacturers v. Meredith(a), *Sutton v. Clarke* (b), *Attorney-General v. London and Southampton Railway Company* (c), *London and Birmingham Railway Company v. The Grand Junction Canal Company* (d), *Duncan v. Findlater* (e). This is in substance a public act, and is not to be regarded as an act dealing with rights to a private estate in which strangers are not bound: *Hargreaves v. Lancaster and Preston Junction Railway Company* (f). The act, moreover, incorporates and makes part of itself two other acts, which are unquestionably public acts, and which would give a public character to the whole, if it were otherwise private. The question on the first issue was not wholly found in favour of the Plaintiff, and the costs must therefore be severed: *Prevost v. Bennett* (g), *Bearblock v. Tyler* (h).

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—
Argument.

VICE-CHANCELLOR (after stating the interlocutory proceedings which had been had in the cause):—

Feb. 20th.
—
Judgment.

The Plaintiff alleges by his bill that the ancient main drain is sufficient, and not more than sufficient, for the purpose of draining his lands; and that if the additional water is allowed to be brought in from the *Ozgangs* drain without making a further outlet, or some other provision for carrying it off, the water will be penned back and his estate flooded. If that statement be true, there can be no doubt that the case is one of destruction in the view of this Court. The injury of which the bill complained was a prospective injury; for at that time no damage had actually

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| (a) 4 T. R. 794. | (e) 6 Cl. & Fin. 894. |
| (b) 6 Taunt. 29. | (f) 1 Railway Cases 416, |
| (c) 1 Railway Cases, 302, 430. | |
| 315. | (g) 2 Price. 272 |
| (d) Id. 224, 239. | (h) Jacob, 571. |

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been sustained, and the Plaintiff, therefore, had no means of trying his right in an action at law. All he could do was to come to this Court; and if he abstained from coming to this Court until the mischief was done, he would probably have been told he was too late, and that he must seek compensation for the destruction of his estate by an action for damages against the parties. Another reason why the Plaintiff could not safely defer his application was, that if he had waited until the commissioners had made their award, there was nobody against whom he could have proceeded for protection. The question, moreover, was one which admitted of a determination prospectively, for it depended on the levels of the land, and the application of known principles of science to those levels. In every point of view, the case appeared to me to be one in which he was entitled to come to this Court, if the facts were made out.

Upon the motion for the injunction being made *ex parte*, I did not think it was right to restrain the Defendants from doing the precise act which it was said they were about to do, but I thought that I should rather meet the justice of the case by framing the order in a way which should amount simply to notice to the Defendants of the strict right upon which it appeared to me the Plaintiff was entitled to insist. This I thought would be effected by restraining the Defendants from permitting the water from the new drain to flow into the ancient watercourse, so as to obstruct the Plaintiff's drainage of any of the lands by means of such watercourse, as the same had been theretofore used and enjoyed by the Plaintiff.

Now, whether that form of order is an useful or a proper form to be adopted under such circumstances,

I have not now to decide (a). It is a great satisfaction to me to know, that if the order was wrong it was practically harmless; for the Defendants did not think it necessary to come to discharge it until upwards of three months afterwards. The motion to discharge the order was argued before me in March, 1845.

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The first point taken upon that argument was, that the works which the Plaintiff complained of were within the powers conferred upon the commissioners by the act of Parliament. The second point was, that no damage would in fact accrue from what the commissioners were doing. In other words, the Defendants insisted that they had a right to do the acts complained of, whether they occasioned damage to the Plaintiff or not; and, therefore, that no injury for which he could obtain redress in law would arise; and whether that were so or not, they insisted that the Plaintiff would sustain no damage in fact. In the course of the argument of the motion, I referred to a case which came before the Lord Chancellor, upon an application to restrain some persons from building lodging-houses, or chambers, at the back of the houses in *George-street, Hanover-square*. The Lord Chancellor, after advert- ing to the difficulty of restraining parties from doing an act which might not be injurious, said, he would allow the parties to go on, provided they would submit to any order the Court might afterwards make, if it turned out that that which they said would be no injury should in truth turn out to be an injury. The difficulties in that case and the case before me were

(a) See the form of injunction in the case of the *Hungerford Market Company v. Charing-cross Bridge Company*, before the Lord Chancellor, in March, 1847, which pursued the words of the covenant, the benefit of which the Plaintiffs claimed.

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the same; and I made a proposal to the parties, that they should take that course. However, the Defendants (and I do not at all complain of it, as they thought it was the right course) refused to enter into any undertaking, and left me to make such order as I thought fit. In these circumstances, there being no opportunity of bringing an action, I thought the case of *Blakemore v. The Glamorganshire Canal Company* (a) afforded a guide as to the course which I ought to take. There the question was, whether damage would result from a thing threatened to be done; and I directed the issue in the same form as Lord *Eldon* did in that case;—whether the drainage made, and intended to be made, by the Defendants, would obstruct the Plaintiff's drainage, as theretofore used, to his damage and injury.

Now, I must say, that the parties ought to have appealed from my judgment, if they thought that I had done wrong in sending the case to an issue. If the act was one which the commissioners had power to do, whether they drowned the Plaintiff's estate or not, it was perfectly useless to ascertain, as a question of fact, whether their works would drown it or not. Instead of appealing from the order, the Defendants went to trial of the issue, and a verdict was found for the Plaintiff,—the learned Judge (Mr. Baron *Rolfe*) stating, that he should, as he thought, have come to a different conclusion, but that he was not dissatisfied with the conclusion to which the jury came. The case has been since before Lord *Lyndhurst*, whose scientific knowledge is of the first order, and his view of the question, and that which I have gathered from other inquiries, leads me to believe that the learned Judge who tried the cause overlooked one scientific

(a) 1 Myl. & K. 154.

principle,—he deduced his conclusion from a case of standing water; whereas here the question was, what would be the effect of penning back running water?

I granted a new trial of the issue, upon the ground that there had been in the course of the season such weather as would enable the jury, who were to try the case a second time, to have facts instead of mere speculation to guide their judgment. In March, 1846, the second trial of the issue took place, when the verdict was as before. It was tried before Mr. Justice *Patteson*, who is also a judge very well versed in matters of science; and he told me, that he not only was satisfied with the verdict, but that it was impossible to hear the case tried without coming to a conclusion that the jury were right; that it was perfectly clear Mr. *Dawson's* land would be flooded, if the plan of drainage in question were adopted.

The cause has now been brought to the hearing, and the Defendants, not having chosen to appeal from the order directing the issue in March, 1845, have re-argued before me the point of law upon which they then insisted. With respect to that point my observations will be few. Where an act of Parliament, in express terms, or by necessary implication, empowers an individual or individuals to take or interfere with the property or rights of another, and upon a sound construction of the act it appears to the Court that such was the intention of the Legislature,—in such cases it may well be the duty of the Court, whose province it is to declare and not to make the law, to give effect to the decrees of the Legislature so expressed. But where an act of Parliament merely enables an individual or individuals to deal with property of his or their own, for their own benefit, and

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does not, in terms or by necessary implication, empower him or them to take or interfere with the property or rights of others, questions of a very different character arise. Here the distinction between public and private acts of Parliament becomes material. By a private act of Parliament, I do not mean merely private estate acts, but local and personal, as distinguished from general public acts. Public acts, it is said in the books, bind all the Queen's subjects. But of private acts of Parliament it is said, that they do not bind strangers, unless by express words or necessary implication the intention of the Legislature to affect the rights of strangers is apparent in the act; and whether an act is public or private does not depend upon any technical considerations, (such as having a clause or declaration that the act shall be deemed a public act), but upon the nature and substance of the case. For those general propositions it is not necessary I should do more than refer to Sir *Francis Barrington's case* (a), and *Lucy v. Levington* (b). That the Defendants' act in this case is a local, personal, and in that sense a private act of Parliament, does not admit of dispute. It is local, as being confined to a particular place; and personal, as being expressed to be for the benefit of individuals named in it, and not for the benefit of all her Majesty's subjects;—however, all may incidentally be benefited by that which improves this particular district. [His Honor read the title and preamble of the act (c).] Here we have that which in many of the reported cases is stated to be the distinguishing mark of a private act of Parliament. It states that the persons intended to be benefited by the act are the persons having personal interests in the property which it is the purpose of the act to improve; and the act

(a) 8 Rep. 138, a.

(b) 1 Ventris, 175. See 2 Dwaris, 630.

(c) *Supra*, p. 415.

then appoints commissioners, empowers them to enclose, and contains the drainage clause, upon which the Defendants more especially found the right which they have insisted upon in this suit. The Plaintiff is a stranger to the act under which the Defendants are proceeding.

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 Judgment.

Two questions have been argued in this case,—first, whether the general power to drain, in clause 27 (a), gives the parties interested in the land to be enclosed, through the commissioners, larger powers as against the Plaintiff than they had before the act, so as to enable the commissioners to do damage to strangers, which the proprietors of the land to be enclosed could not have done without the act; and if that question be answered in the affirmative,—secondly, whether that larger power has been duly exercised in the present case.

In a former stage of the cause, I thought it right to let the Defendants know what my opinion upon this point was. But although I thought it right to state that opinion, I did not think it right, in that stage of the cause, to act upon the opinion which I expressed. On that occasion I took a course than which none could be more calculated to protect a judge of this Court against miscarriage;—I directed an issue, in the form of the issues directed by Lord *Eldon*, after great consideration, in the case of *Blakemore v. Glamorganshire Canal Company*, whether the Defendants had done the acts complained of to the “damage and injury of the Plaintiff?” (b) The object of Lord *Eldon*, in so framing the issues, was, that upon the trial of the issues the defendants might have the benefit of every defence with which the act of Parliament could furnish them. And this appears to be the safest, if not the only safe,

(a) *Supra*, p. 416.

(b) 1 Myl. & K. 169.

course which, in cases so circumstanced, can be taken; however, it may be open to the observation, that it does, in some degree, convert the issue into an action,—the issue being in substance the same with the declaration appearing by the reported cases to be in use where individuals have complained of acts done by commissioners or trustees under acts of Parliament not unlike the present (a). *Blakemore v. The Glamorganshire Canal Company* is in this respect undistinguishable from the present case; and the verdicts in this case establish one of those two propositions. Indeed, where relief is sought for, in respect of injury apprehended from acts to be done, there is, as it appears to me, no other way of trying the question. No one can argue with success, that the Plaintiff in this case ought to have waited until the drain was made, the award published, and his estate destroyed.

With respect to the cases cited for the Defendants, it will be found that the statutes under which the Defendants acted empowered them in terms, or by necessary implication, to take or interfere with the property or rights of the parties complaining in the way complained of. In the *Governor and Company of the British Cast Plate Manufacturers v. Meredith* (b), the statute empowered the commissioners to raise the street, the raising of which was the ground of the action. In *Sutton v. Clarke* (c), the defendants were empowered to cut any watercourses across any lands or grounds for the purpose of draining the highway. *Boulton v. Crowther* (d) is a case of the same class, as are the railway and canal cases which were cited. In all those cases

(a) 2 B. & C. 703; 6 Taunt. 34, 35; 4 T. R. 794. See 6 Cl. & Fin. 906.

(b) 4 T. R. 794.

(c) 6 Taunt. 29.

(d) 2 B. & C. 703.

the purposes of the statute were of a public, or quasi public nature, and the scope of the statute was to enable the defendants to interfere with private rights, without which interference their operations could not be carried into effect. But it is not upon the public purposes of those statutes that I rely,—but upon the express and definite powers given by the acts. The case of *Riddle v. White* (a) was cited by both parties. That case was decided upon the very words of the act, which, it was said, left no doubt upon the intention. The Lord Chief Baron *McDonald* said, “The Legislature takes upon itself to alter entirely the mode of tithing all the lands which are to be the subject of the enclosure. It is impossible to say that the rector is entitled to his tithes of the land in question, without saying that he would have it in his power to defeat all the purposes of the act, which the Legislature never could intend. This case is, in point of principle, precisely the same as the case in *Vernon* (b). In private acts in general, the Legislature does nothing more than enable persons to enter into a contract who could not otherwise enter into it; and the persons who are parties to the act are expressly named in it: but here the Legislature does a great deal more;—it takes on itself to act on the land itself, to declare that it shall be discharged of tithes. According therefore to the principle of the decided cases, and indeed of common sense, we think that the rector cannot claim his tithes against the express words of the act of Parliament” (c). From a note to that case (d), it may perhaps be questionable whether the decision would have been the same if the Lord Chief Baron *Eyre* had remained at the head of the Court. But this is immaterial; for the case went upon the ground that the lands were bound.

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(a) 4 Gwill. 1387.

(c) 4 Gwill. 1395.

(b) *Ward v. Cecil*, 2 Vern.

(d) *Ib.*

Stead v. Carey (a) was decided upon the like ground,—that the words of the act were conclusive in favour of the intention to bind all the world. But these cases leave untouched the proposition, that an act of Parliament, not being a public act, will not bind the rights of strangers, unless by express words or necessary implication the intention to do so can be collected. It is a question of construction.

Now, what is there in the present case from which to imply an intention on the part of the Legislature to empower the proprietors of and persons interested in the lands to be enclosed to invade the existing rights of others? Omit the consideration, that the commissioners are officers having no interest in the lands, and this question can admit but of one answer. Then, how is the case altered because commissioners are appointed: they are appointed, not because it was intended that the rights of strangers should be invaded, but because such machinery was required to effectuate the object of the act as between the owners of the lands. I do not impugn the doctrine, that commissioners so appointed, and acting to the best of their judgment, are not to be charged with damages consequential upon the acts they are empowered to do. But here the question is, what acts have they power to do?—and I am at a loss to understand how an answer to that question can be found in the fact, that commissioners are appointed. But as I said before, the verdicts cover not only that, but every question that can be made in the case. The verdicts are wrong, if the Defendants' argument is right. I think myself bound, therefore, to make a decree for the Plaintiff.

The Plaintiff has not gone into any evidence by which, in this stage of the cause, I can be informed of

those details by which my judgment was governed in the earlier stages, and by which (if I had them judicially before me) the frame of my decree might be regulated. The two verdicts, and those only, constitute the Plaintiff's evidence in the cause; and though I may refer to the interlocutory proceedings for the purpose of informing myself what those verdicts have decided, I cannot go further. The verdicts decide that the Plaintiff is damaged by the use of the Defendants' drains, as they and the other drains now are, but they decide nothing more. This makes it very difficult to frame a decree which shall not be open to the objection, either that it improperly restrains the powers of the commissioners, or that it is based upon assumptions not warranted by the evidence strictly before me. Something was said about the Plaintiff's title:—I apprehend that that is sufficiently shewn. Mr. *Dawson* is in the admitted possession of the lands, and this is a trespass committed upon him, which trespass the verdicts have established. On that part of the case I entertain no doubt. But I can only make a decree which the Plaintiff's possession, coupled with the verdicts, without more, will support.

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DECLARE, that the Defendants, in exercising the powers given them under the act of Parliament, intituled &c., are not at liberty to set out, make, or use any drain or watercourse, whereby the drainage of the Plaintiff's lands, by means of the ancient watercourse or drain in &c., in such manner as the same has been heretofore used and enjoyed by the Plaintiff, will be obstructed. And restrain the Defendants from using the drain or watercourse in &c., called the *Ozgangs* drain, for the purpose of draining the waters from the *Ozgangs* and *Whitemoors* in &c., or any part thereof, into the Plaintiff's ancient drain or watercourse in &c., in the present state and condition of that drain and the other drains in, &c., and also from using the same *Ozgangs* drain (in its present or any altered state for the like purposes) without providing, for the water to be brought into the said ancient watercourse or drain, an outlet sufficient to

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prevent the drainage of the land in such manner as the same has been heretofore used and enjoyed by him, being obstructed. Tax the costs of the Plaintiff of these suits (except the costs of the two motions hereinafter mentioned) and also the costs of the issues, and of the motion for a new trial; and tax the costs of the Defendants of the motion of the 15th day of December, 1845, and of the motion for the costs of the issues, and let the same be deducted from the costs first directed to be taxed. And let the balance be paid by the Defendants to the Plaintiff.

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*1st, 2nd, 6th,
 & 30th May.*

On a devise of successive interests in leases for lives or years, where the testator directs that the leases are from time to time to be renewed, without more, the fines and expense of renewal are to be borne by the tenant for life and remainderman, or parties successively entitled, in proportion to their actual enjoyment of the estate, and not in proportion to an extent of enjoyment to be determined speculatively, or by a calculation of probabilities.

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W. JONES, by his will, dated in June, 1803, gave, devised, and appointed all his freehold and copyhold lands and hereditaments unto the use of trustees, upon trust to convey, settle, and assure the same to the use of his great nephew, *William Jones*, and his assigns, during the term of 99 years, if the said *William Jones* should so long live, without power to commit waste, remainder to the use of the first and every other son of the said *William Jones*, severally and successively, according to their respective seniorities in tail male, with remainder over and with reversion to the testator's own right heirs. And the testator gave, devised, and bequeathed to the

There is no difference in the rule as to the apportionment of fines for renewal between the devisees of successive interests in the estate, whether the leases are for lives or for years.

If the testator provides a specific fund for the renewals, or directs that the renewals shall be raised or borne by the parties in a certain manner, or in certain proportions, such direction supercedes the general rule; but if trustees, having power to direct the manner in which the fines shall be raised, do not exercise the power, the Court will pursue the general rule which would be adopted in the absence of any direction as to the manner of providing for the fines.

Whether there is any difference in the rule of apportionment in cases where the parties take successive interests under wills, and in cases where such interests are taken under settlements by deed—*quære?*

Whether trustees, having power to raise the fines out of the rents and profits, or by mortgage, or otherwise, as they should think fit, might so act as to throw the burden on the parties, in proportions different from those in which it would be distributed by the general rule of the Court—*quære?*

same trustees, the rectory of *Newport*, in the county of *Monmouth*, and the great tithes in the parishes of *St. Woollos* and *Bettws*, held by lease from the Bishop of *Gloucester*, for the lives of the persons in such lease named, or to be held at the time of his decease by any renewed lease or leases, and the manor of *Peterstone* and the rectory and tithes of *Peterstone*, and all other the premises in the same county held by lease from the dean and chapter of *Bristol*, for the term of years in such lease mentioned, or to be held at the time of his decease by any renewed lease of the said premises, and all other lands and tenements of or to which he was then, or at the time of his decease, seised, possessed, or entitled for any lease or leases for lives or years, to hold the said manors, rectories, hereditaments, and premises, unto and to the use of the said trustees, their heirs, executors, administrators, and assigns, according to the nature and quality of the same premises respectively, in trust, by such assignments and assurances as counsel should advise, to settle the said leasehold premises so that the same might be possessed, held, and enjoyed by the said trustees, their heirs, executors, administrators, and assigns, upon trust, by and out of the rents, issues, and profits of said leasehold hereditaments and premises, yearly and every year, and in all other times and seasons, duly to pay, satisfy, and perform the rents, reservations, covenants, and agreements reserved and contained by and in the then subsisting indentures of lease of the said lands and tenements respectively, or which by and in the several leases to be from time to time renewed or taken thereof, as is thereafter mentioned, should be reserved and contained on the lessees' part to be paid and performed, and by and out of the rents, issues, and profits, or by mortgage of the said leasehold lands and tenements, or by such other ways and means as should be advisable in that behalf, forthwith to raise such sum and

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and fines and other charges of renewing the said lease or leases, or any future lease or leases to be granted to them or him for life or lives, or for any term of years, when and as often as there should be occasion, or as such leases had usually been renewed, and from time to time to renew the said several leases accordingly, for which purposes it should and might be lawful to and for the said trustees, their heirs, executors, administrators, and assigns, when and so often as there should be occasion, or when and so often as the usual course for the renewal of the said leases should require, to surrender the subsisting leases, or the leases to be thereafter taken of all or any of the premises, and to take new leases of the same premises ; and subject to the aforesaid several trusts for the providing for the renewals of the leases of the said leasehold premises, such trusts should by the settlement thereby directed to be made or declared of the said premises, as would best and nearest correspond with the uses and trusts thereinbefore directed to be limited or declared of and concerning the fee-simple hereditaments thereinbefore devised, so as the same leasehold premises should and might from time to time be held or enjoyed by the person or persons who for the time being should by virtue of or under the settlement thereinbefore directed to be made as aforesaid, be entitled to the possession, or the rents, issues, and profits of the said fee-simple hereditaments, or as near thereto as the nature and quality of the said estates and the rules of law and equity would permit ; but in the intended settlement it was to be provided, that, for the effect or purpose of transmission, the said leasehold premises should not vest absolutely in a son of any person thereby made tenant for ninety-nine years, if he should so long live, of the said fee-simple hereditaments, until such child attained the age of twenty-one years ; and also, that if such of the said leasehold pre-

mises as were or should be held for a term or terms of years, should not, under the trusts thereinbefore contained, vest absolutely in some child or grandchild of his said nephew, the said trustees, their executors, administrators, and assigns, should stand and be possessed of and interested in the said leasehold premises, in trust for his nephew, the said *John Jones*, his executors, administrators, and assigns, for his and their use and benefit. And the testator declared that such intended settlement should contain a power for the trustees, their executors, &c., to lease the premises comprised in the said lease or leases, for any period not exceeding twenty-one years, without fine; a provision for applying a competent part of the rents and profits to the maintenance of the persons for the time being entitled under the settlement; for the investment of the surplus, upon the trusts thereafter declared, of the residuary personal estate; and a power of jointuring; and such further and other clauses, declarations, and agreements conformable to the spirit, true intent, and meaning of that his will, or the settlement so to be made as aforesaid, as the said trustees or the survivor of them, or the executors, administrators, or assigns of such survivor, should think proper. And the testator gave to the same trustees, their executors, &c., all other his personal estate whatsoever, not specifically bequeathed, upon trust, to call in and convert and invest the same in the purchase of other lands as therein mentioned, and to settle and assure such other lands to the uses thereinbefore declared of and concerning the said devised lands and hereditaments, or as near thereto as the nature of the estates, the deaths of the parties, and other intervening circumstances would then admit of; and the testator appointed the same trustees to be executors of his will.

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The testator died in April, 1805. *William Jones*, his

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great nephew, was then seven years of age. The trustees entered into possession of the estates, and accumulated the rents, profits, and income of the freehold and leasehold estates, and the residuary personal estate to a large amount. The trustees, also, in May, 1808, executed indentures of lease and release for the purpose of settling the estates according to the trusts of the will. Under subsequent appointments, the Defendants, *John Jones* and *William Vaughan*, were the substituted trustees of the estates.

William Jones, the great nephew, attained his majority on the 1st of December, 1819.

Some of the leasehold estates of the testator were held, for lives, under the Bishop of *Gloucester*, and were of the value of about 650*l.* a year, after deducting the reserved rent of 8*l.* a year; and other parts of such leasehold estates were held for years under the dean and chapter of *Bristol*, and were of the value of about 450*l.* a year, after deducting the reserved rent of 34*l.* 13*s.* per annum. The leaseholds for lives were usually demised for three lives, renewable on payment of a fine on the failure of any one or two of the lives; and the leaseholds for years were demised for twenty-one years, renewable on payment of a fine at the end of every seven years. The three lives upon which the rectory and tithes of *Newport* were held at the death of the testator, all subsisted until July, 1840, when one of the lives dropped, leaving the two survivors of the respective ages of 60 and 76 years. The trustees thereupon agreed with the Bishop of *Gloucester* for the renewal of the lease for 4000*l.*, by the addition of another life; and in consideration of that sum, and the surrender of the former lease, a new lease, dated the 28th of August, 1841, for the three lives, was granted to the trustees.

The lease held of the dean and chapter of *Bristol*, had been granted to the testator in November, 1802, for twenty-one years, and the same was renewed by the trustees in November 1809, for a term of twenty-one years, on payment of a fine of 854*l.* 10*s.* 7*d.*; in November, 1816, on a fine of 1205*l.* 0*s.* 6*d.*; in November, 1823, (after the majority of *William Jones*,) on a fine of 950*l.*; in November, 1830, on a fine of 1100*l.*; and in September, 1840, on a fine of 2350*l.*; making together, 6459*l.* 11*s.* 1*d.*, exclusive of costs. The sums thus paid by the trustees for fines were, until the majority of *William Jones*, paid out of the accumulated rents and profits of the freehold, leasehold, and residuary personal estate, and, after the majority of *William Jones*, out of the capital of the trust funds in the hands of the trustees.

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William Jones had several children. The bill was filed by *Reginald*, his eldest son, an infant, the first expectant tenant in tail in remainder of the estates under the will and settlement. The bill charged, that, when the trustees, in November, 1816, renewed the lease from the dean and chapter of *Bristol*, they, being then in possession of the rents and profits of the premises comprised in the lease, ought forthwith to have begun to put by or reserve out of such rents and profits, a fund towards the next septennial renewal; and such fines being considered as divided into seven parts, one seventh part ought to have been put by or reserved out of each year's rents and profits by the trustee, until December, 1819, and by the Defendant, *William Jones*, the tenant for life in possession, after that time: that when the lease was renewed in November, 1823, the 950*l.* then paid, ought not to have been wholly paid out of the capital of the trust funds in the hands of the trustees, but should have been apportioned between the trustees and *William Jones*,

the premises since the renewal of 1816, namely, a little more than three seventh parts by the trustees, and something less than four seventh parts by the Defendant, *William Jones*; and as to the fines paid for the renewals of the same lease in 1830 and 1840, and for the renewal of the lease from the Bishop of *Gloucester* in 1841, that the same ought to have been wholly paid or borne by the Defendant, *William Jones*, and no part by the trustees; or, otherwise, that the fine paid on the renewal of the lease for lives in 1841, should be considered to have been raised as or by way of mortgage of such leaseholds for lives, in which case the Defendant, *William Jones*, as such tenant for life, ought to pay or keep down the interest on the amount of the fine during his life; and that his estate, after his decease, would be liable to contribute such further sum as with the annual interest would be equivalent to the relative duration of his future enjoyment of the renewed estate, as such tenant for life in possession; or otherwise that the amount of benefit derived by the Defendant, *William Jones*, from such renewal should now be ascertained, by first putting a value, as on the 28th of August, 1841, (the date of the renewed lease,) on the joint duration of the lives of the Defendant, *William Jones*, and of the then *cestuis que vie* (or the longest liver of them), and next, putting a value, as on the same day, on the joint duration of the lives of the Defendant, *William Jones*, and the same *cestuis que vie*, and *William Beaumont*, the new *cestui que vie* (or the longest liver of them), and by taking the difference, or excess of value, as the measure of benefit derived to the Defendant, *William Jones*.

The bill prayed that the trusts of the will might be carried into execution, and that the Defendant, *William*

Jones, might be decreed to account for and pay to Defendants, the trustees, a proportionate part of the renewal fines, and the costs incurred in and about renewals; or that he might be decreed to bear a proportionate part of the fine paid on the lease of 1841 charging the same by way of mortgage on the premises the Defendant, *William Jones*, keeping down the interest at 4l. per cent., and his estate being liable at his death to contribute such further sum as, with such yearly interest, should be equivalent to the relative duration of his enjoyment of the renewed estate; or that the relative proportions of the fine might be ascertained by valuation as aforesaid; and that the Defendant, *William Jones*, might be decreed to provide for and secure the payment of such sum for which his estate should be liable at his death. The bill also prayed a declaration, whether the settlement of May, 1808, was, in certain points, a due execution of the trusts of the will.

The facts were not in dispute, and the Defendant, *William Jones*, the tenant for life, as well as the trustees, submitted the question to the Court.

Mr. *Walker* and Mr. *F. Bayley*, for the Plaintiff. The case of temporary interests, for life or years, where the recurring payments are necessary to preserve the estate, is wholly different from the interests of successive parties in an equity of redemption; there the owner of the *corpus* properly takes the mortgaged debt with the *corpus*, and the tenant for life bears the interest only; but on renewals of leases for lives or years, the tenant for life is not only bound to pay the interest, during his enjoyment (which applies, however long or short may be the duration of such enjoyment), but he is liable for

he takes in the estate by the application of the principal paid for the purchase of the renewed interest: *White v. White* (a). The question is, when and how the amount of that additional proportion of the burden is to be ascertained? The general rule, in cases of leases for lives, is to permit the entire fine to be raised by mortgage, and to require the tenant for life to contribute in proportion to the benefit which, in the event, he derives from the renewal; and as to leases for years, the rule is to lay by, out of the annual produce, by anticipation, a sufficient sum to provide for the fine. It is clear, that if the fines be apportioned on the produce of each year, the party entitled for the time being to the rents and profits, will bear his proper share, and no more. But where the amount of the fine and the time of renewal is uncertain, as in leases for lives, or cases where the fines are arbitrary, and it is impossible to set aside annually the sum which will be actually necessary, the Court cannot determine *ab ante* the proportions chargeable upon the successive interests without the hazard of a wrong determination (b). And where a proportion of the fine cannot be laid aside year by year, the respective proportions of the tenant for life and remainder-man cannot be known, until the death of the tenant for life has ascertained the extent of the benefit which he has derived from the anticipated payment. Even then we arrive rather at the amount of the benefit which the remainder-man possibly may, than that which he must necessarily derive from the renewal, for, as said by Lord Eldon (c), "the actual interest the remainder-man takes may be nothing more than the opportunity, that the lease renewed *in presenti* has secured, to apply at the end of that term for another renewal." In *Night-*

(a) 4 Ves. 24; 5 Ves. 554; (b) 9 Ves. 556.
9 Ves. 554, 560. *S. C.* (c) 9 Ves. 557.

ingale v. Lawson (a), the tenant for life was under no obligation to renew the lease. In *Stone v. Theed* (b), the result was, that the fine was paid out of the accumulated fund, which consisted of the income; and in subsequent cases that course has been followed; and where there has been a direction to renew, and no fund expressly provided, the fines have been charged upon the rents and profits of the premises: *Lord Montford v. Lord Cado-gan* (c), *Lord Milsintown v. Earl Portmore* (d), *Earl of Shaftesbury v. Duke of Marlborough* (e). If the testator or settlor points out a particular fund, or directs that the fines are to be raised in a certain manner, his direction will be pursued: *Playters v. Abbott* (f),—which case, it must also be observed, related to fines upon the admission to copyhold, which suggests different considerations. The introduction of alternative modes of raising the fines, or giving the trustees express power to mortgage the estate for that purpose, does not affect the relative rights of the parties. The trustees are not thereby authorized to proceed to a sale, nor are they bound to proceed by way of mortgage, nor have they thought proper to exercise their power in that respect. In the absence of any express or definite direction, the Court will pursue the modern rule, which has been to apportion the charge between the tenant for life and the remainder-man according to their interests in the premises: *Allan v. Backhouse* (g), *Greenwood v. Evans* (h), *Reeves v. Creswick* (i). This has been done either by giving to or requiring from the tenant for life, security, as the case might be: it is, in fact, only a modification of the general rule, which throws the charge

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(a) 1 Bro. C. C. 441.

(b) 2 Bro. C. C. 243.

(c) 19 Ves. 635; *S. C.* 17.
Ves. 485.

(d) 5 Madd. 471.

(e) 2 Myl. & K. 111.

(f) 2 Myl. & K. 97.

(g) 2 Ves. & B. 65.

(h) 4 Beav. 44.

(i) 3 Y. & C. 715.

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upon the rents and profits. In interests of this nature, which are not of necessity permanent, and yet are not to be the subject of conversion, there is nothing which can, strictly speaking, be deemed *corpus*, as distinguished from rents and profits. The application of the trust funds hitherto made in the payment of the fines, is not in accordance with the manner of providing for the fines pointed out by the testator, nor with any rule adopted by this Court. The fines must in some way be raised out of the rents and profits of the leasehold premises, which are the subject of renewal.

Mr. Tinney and Mr. Campbell, for the Defendant *William Jones*, the tenant for life.—The proper course in this case is to raise the fines by a mortgage of the estate, throwing upon the tenant for life the duty of keeping down the interest only: *Bucheridge v. Ingram* (a). It is not accurate to say that the Court has laid down any general rule with regard to the apportionment of renewal fines, and certainly it is incorrect to say that the rule of apportionment has been according to the actual benefit derived by the successive owners of the property. In some of the earlier cases, the division of the fines into thirds, and the apportionment of two-thirds to one, and one-third to the other party, is mentioned; but that is clearly not the rule: *Nightingale v. Lawson* (b). It might perhaps have been a proper apportionment in some particular case, and was afterwards inaccurately referred to as a rule. In examining the authorities on the present question, the cases in which the renewals have not been directed by the author of the trust must be excluded. This disposes of *Reeves v. Creswick* (c), and *Bull v. Birkbeck* (d). The other cases may be divided into three classes. The first consists of

(a) 2 Ves. jun. 652.
 (b) 1 Bro. C. C. 440.

(c) 3 Y. & C. 715.
 (d) 2 Y. & C. C. C. 447.

cases in which the cost of renewals has been held to be chargeable on the rents and profits: *Stone v. Theed* (a),

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(a) This case was examined by Mr. Campbell, to whom the reporter is indebted for the following note :—

STONE v. THEED, 2 Bro. C. C. 243; Reg. Lib. 1786, fo. 689. The will was dated the 20th of May, 1776 (not 1786). After the direction to the trustees from time to time to renew the lease and add new lives if they could obtain such lease, there followed a declaration in the will, "that such new lease or leases should be subject to the same trusts and conditions as before mentioned;" and then followed the power to place out at interest "the overplus of the rents." The Defendant, *Bridget Wodnoth*, the annuitant, was made a party, as the testator's heir-at-law. In addition to what is stated in Brown's Report, of the original decree at the Rolls, such decree declared—that the rents and profits of the freehold and leasehold estates accrued and to accrue since the death of *Ann Wodnoth*, belonged and would belong to the then Defendant, *Bridget Wodnoth*, the heir-at-law of the testator, subject to the two annuities, or such part thereof as the clear residue of the personalty would not be sufficient to satisfy, until some other person should become entitled to receive the same upon the contingencies in the will mentioned; and the Court di-

rected an account of such rents and profits. By the *Master's* Report it appeared that such rents of the leaseholds were 313*l.*, and of the freeholds, 573*l.* *Bowles*, the second life, dropped, after the decree, in August, 1786, and the renewal was made on the 12th of March, 1787. The cause came before Lord *Thurlow*, for further directions, in July, 1787, when the Court declared—that the rents and profits of the freehold and leasehold estates and the interest of the personal estate not specifically bequeathed, were applicable to the renewal of the lease under which the estate at *Westbury* was held, in manner hereinafter mentioned. And it appearing that one of the lives dropped in May, 1780, in the lifetime of *Ann Wodnoth*, and that 222*l.* 17*s.* 10*d.* was paid on filling up such lease, the Court did declare that the rents, and the interest of personalty, which accrued after that period during the life of *Ann Wodnoth*, were applicable, as far as they would extend, to make good the said 222*l.* 17*s.* 10*d.*, and it was ordered that the same be answered by her executors, they admitting assets, and that the deficiency be made good out of the said 313*l.* and 573*l.* (being the rents accrued after the death of *Ann Wodnoth*), and it was ordered that the residue of these two sums be paid to the executor of *Bridget Wodnoth*. And

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Lord Mansfield v. Lord Gainsford, Lord Hardwicke v. Earl of Portmore, Earl of Shaftesbury v. Duke of Marlborough.
The second class are cases where the renewals have

it being alleged, that, on the 16th of August, 1786, another life dropped, and that *Bridget Wodnoth* died on the 12th of October, 1786, and that on the 12th of March, 1787, a new life was added at the cost of 222*l.* 17*s.* 10*d.*, which was paid by the Plaintiff, the Court did declare—it appearing the interest of the residuary personalty was not sufficient to pay the two annuities, that the rents of the freehold and leasehold estates accrued after the 16th of August, 1786, in the life of *Bridget Wodnoth*, were applicable to make good the same, and it was referred back to the *Master* to carry on the account of rents, distinguishing those before the 16th of August, 1786, from those after that date; and it was ordered that those accrued before that date be paid to the executor of *Bridget Wodnoth*, and those accrued afterwards to the Plaintiff, in part of the said last-mentioned sum of 222*l.* 17*s.* 10*d.* so paid by her (the Plaintiff).

On the above, it is to be observed, that *Bridget Wodnoth*, as *heir*, on the death of *Ann Wodnoth*, became tenant for her own life, not under the will, but by act of law, with remainder under the will to her children, if she should have any. She had none, in fact, so that on her death the remainder took effect in favour

of the Plaintiff, *Catherine L. Stone*. But the gift to the Plaintiff was only to take effect from and after the death of *Bridget Wodnoth*, in case *Bridget* should die leaving no child. The will left entirely undisposed of, the surplus rents to accrue during the life of *Bridget Wodnoth*, after paying her own annuity of 100*l.* a year, and the other annuity of 30*l.* a year. And these surplus rents so undisposed of, devolved to herself during her life, in her character of *heir-at-law*. One of the *cestui qui vies* in the lease died in May, 1780; and *Ann Wodnoth*, the first tenant for life under the will, died in August, 1780. The first question, therefore, was, how much *Ann* ought to have contributed to the inserting a new life? This question Lord *Thurlow* answers by saying, that the whole rents and interest from May to August, 1780, as far as they will go, ought to be applied to make good the renewal fine; and, as they were insufficient, he directs *Bridget*, who, as *heir*, became entitled to the next estate for her life, to bear the deficiency out of the rents accruing to her after the death of *Ann*. Thus, the income alone bears the whole expense of the first renewal, and the tenant in remainder contributes nothing, although in 1786 she succeeds to the benefit of the

been held chargeable on the *corpus*: *Playters v. Abbott*. The third class, where the charge has been apportioned partly on the *corpus*, and partly on the rents and pro-

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renewed life. The burthen has been chiefly borne, not by any tenant for life under the will, but by the heir-at-law, who took an undisposed of estate for her own life by descent. The *Chancellor* treats her as if she were a tenant for life under the will.

Another *cestui que vie* in the lease died in August, 1786, in the lifetime of *Bridget*, who herself died in October, 1786; and the second question was, how much *Bridget* ought to have contributed to the inserting a new life, which was done at the cost of the remainder-man? This question Lord *Thurlow* answers, as he did the former, by saying, that the rents accrued from August to October, 1786, as far as they will go, ought to be applied to make good the renewal fine. In October, 1786, the remainder in favour of the Plaintiff came into possession, and the Plaintiff must bear the deficiency after applying *Bridget's* rents.

The principle, therefore, adopted by Lord *Thurlow*, is one which would in effect place the whole burthen of the renewals on the tenant for life. If the whole rents accruing to the tenant for life from the day the life drops, are sufficient to pay for the renewal, they are to be applied for that purpose; if insufficient, they are to be applied, as far as they will ex-

tend, and in the latter case the remainder-man must bear the deficiency.

Comparing the *Registrar's* Book with the report (2 Brown, C. C., p. 247), a doubt may arise whether Lord *Thurlow* intended that the decree should be, as it was, finally entered. The report in Brown is confused, and the marginal note is incorrect. Taking as a guide the *Registrar's* Book, the case may be explained. Lord *Thurlow* seems to have founded himself on the direction given to the trustees to renew,—the direction, that the new lease should be subject to the same trusts, and the power to the trustees to place out “the overplus” of the rents and profits. He considered, no doubt, that this word “overplus” was to be explained by the preceding direction to renew, and that, therefore, the testator's meaning was, first, to renew in all cases out of the rents and profits; and, secondly, to lay out the overplus of the rents and profits (after the death of *A.* and during the life of *B.*). It is true, as he observes, that “no disposition is made of the accumulation”—meaning the fund which would have accumulated by the laying out the “overplus.” There was, in fact, no accumulated fund. The interest which descended to the heir-at-law was (not the whole rents and

these cases have proceeded upon one general and prevailing principle, that the intention of the testator or

profits, but) this "overplus," and no more, during her own life, that interest being overridden by the previous direction to the trustees to renew. Lord *Thurlow* finds in the terms of the will a solution of the question before him. He says (according to the Report), "I think the terms of the will bind the trustees to apply the funds [first accruing income] of the estate for that purpose." He considers that the testator has provided his own fund, and has put the burthen wholly and expressly on income, and no part on capital, and that his will must be obeyed. The concluding words of the Report are not very clear. The passage should probably stand thus: "The whole fund [*i. e.*] the rents and profits (the personal estate not being productive), must pay the expenses of the trust. The [annual] produce of the whole must be first paid to the purpose of the renewals." Sir *Samuel Romilly*, in his reply in *Allan v. Backhouse*, 2 Ves. & B. 73, observes, that "annual" rents and profits were meant. It will be observed that Lord *Thurlow* makes no distinction in principle between *Ann*, the first tenant for life, and *Bridget*, who became the second tenant or quasi tenant for life. One was actual tenant for life under the will, and the other was

only intitled to an "overplus of the rents and profits," after answering the renewals. But as the trustees were to renew, and out of one and the same fund, and as it was clear (according to his interpretation), that, during the life of *Bridget*, the rents and profits were the fund intended, Lord *Thurlow* held, that the rents and profits must also have been the fund intended during the life of *Ann*.

It may be collected from the Report, as explained by reference to the *Registrar's Book*, that Lord *Thurlow* considered the expenses of renewal as a first charge on the annual rents and profits, and as overriding all the limitations. This would be quite intelligible. "The whole fund," he says, "*viz.* the rents and profits,—must pay the expenses." But no such principle is worked out by the decree in the *Registrar's Book*. The decree does not apply the whole fund—namely, all the rents and profits—but only a small part of them. The decree merely holds that, from the day a life drops, the rents accruing *from and after that day* are the proper fund. One tenant for life may happen to outlive the three lives, and may hold the estate for thirty years, paying nothing. When the next tenant for life succeeds, the lives are all aged, and they may all die in the first year. This tenant

carried into effect. The Court, in each case, sought for and determined upon the construction of the par-

for life has to pay out of his rents, three fines, and may die shortly afterwards, having received nothing. If the expenses of renewal are looked at as a first-charge overriding all the limitations, it does not follow that one tenant for life should escape all charge, and the next tenant for life pay the whole. If trustees are to renew—and to renew out of yearly rents and profits—it would seem that they should begin, as soon as they take upon them the trusts, to reserve or put by something yearly, in order to provide a fund for the event. If they have reserved nothing, but the tenant for life has, up to the time of renewal, received the whole rents, and such rents are sufficient in the whole to meet the renewal fine, then he, the tenant for life, is the party to refund to the trustees the necessary sum. He has now to pay off an incumbrance which preceded his own beneficial enjoyment.

It may be doubted whether the decree in *Stone v. Theod* accurately worked out the intention which Lord *Thurlow* found, in that case,—to lay the burthen upon the rents and profits. The reasoning of Lord *Thurlow*, as it may be collected from the report, would seem to lead to a different result from that which is found in the de-

cree,—a result which may be thus expressed,—“The direction to renew is in the nature of a first charge on the rents and profits, and whoever receives the rents and profits must bear that charge thereout. The testator died in 1778, leaving the three lives full. The first life drops in 1780, in the lifetime of *Ann*, the first tenant for life, and the cost of renewal is 222*l*. The Court could not have said, *ab ante*, what sum the trustees ought to have reserved out of the rents, in order that they might be prepared with the fine when required. But *now*, it is seen that the trustees should in each of the two years of the tenancy of *Ann*, and during her enjoyment of the estate, have deducted from her 111*l*, until the life dropped, and then they would have had the requisite amount in hand. Let her estate therefore bear that renewal fine. The next life drops in the lifetime of her successor *Bridget*, who enjoyed the estate for six years, and upon such failure of the life the same fine is paid as before. The Court can *now* determine, that the trustees should, in each year of her tenancy, until the life dropped have deducted from her 37*l*. and then they would have had the requisite amount in hand. Thus the will will be satisfied and the remainder-man will

appropriated to the charge, rather than applied any general rule to the case. The first class of cases,—those in which the testator has charged the rents and profits exclusively with the expense of renewal, are not therefore authorities in this case, where there is no such exclusive charge. If the cases of *Lord Montford v. Lord Cadogan*, and *Lord Milsintown v. Earl of Portmore* differ from the others of this class, it must be remembered, that they are cases of settlements, and not of wills: they are, however, expressly founded upon the particular intention. The cases of the second class are authorities for charging the fines upon the *corpus*, and they are relied upon by the Defendant in this case, not as establishing any general rule, but as justifying a like construction of this will.

bear nothing. If the Court were to make the first tenant for life answer for the rents only for the period after the first life drops, as she lived only three months, she in fact would pay little or nothing, and it is not just that the succeeding tenant for life should pay the whole deficiency. The same observation would apply to the second life, which drops in the lifetime of the second tenant for life. The tenant for life dies in two months after, and thus the burthen would fall almost wholly on the remainder-man. This would not accord with the intention of the testator, for the testator has made a provision which may exhaust the estate of the first taker. He sacrifices the intent of a provision for the first taker to the original intent

of keeping up the estate.”

The case of *Stone v. Theed*, is the root of the doctrine with respect to the fund for renewal fines, where renewals are directed by the will. As explained, that case seems to be an authority for the decision in *Shaftesbury v. The Duke of Marlborough*, with this difference, that Sir John Leach carried out the principle to its consequences. He found an intention in the will that the costs of renewal should override every beneficial estate, and the Duke of *Marlborough*, the first tenant for life, having received rents and profits sufficient to answer the renewal fine, he held that the Duke had only borne a burthen properly chargeable upon him in respect of his estate.—J. C.

It was the case of a lease for lives, with a direction to renew out of the rents and profits, and a declaration that the renewed leases should be held upon the same trusts. There is, apparently, no reason why it should not have been governed by *Stone v. Theed*. The tenant for life inserted two new lives at his own expense, and then filed his bill against the trustee and the remainderman, praying that he might be declared an incumbrancer for the amount, or some part thereof. No such bill seems to have been filed in any previous case. If the rule be, as it is argued on the other side, to apportion the fine according to the actual enjoyment of the property, the answer to the suit was obvious. "Wait and see the event. The new lives which you have added may be exhausted by your own tenancy. The remainderman may possibly derive no benefit from your renewal. At your death it will be ascertained whether the remainderman is your debtor in respect of the renewal, and if he be so, the estate will remain as your security for the debt." Sir *Thomas Plumer*, however, according to the report of his judgment, held that the amount of the renewal fine ought to be raised by sale or mortgage, and that there must be an inquiry, "what proportion of the capital, as well as the interest, with reference to *the benefit derived* by the tenant for life, is to be paid by him" (b). The decree, as drawn up, directed an inquiry, "how much of the said fine, fees, and expenses, with reference to the *interest* of the plaintiff in the said estates, ought to be borne and paid by him." This decree was affirmed by Lord *Eldon*, on appeal (c). The actual benefit derived by the tenant

(a) 2 V. & B. 65.

(b) Id. 79.

(c) Lin. Inn, August 7th, 1821. It is believed that the only report of Lord *Eldon's* judgment, in print, is contained in the *Law Magazine*, Vol. 26, p. 112. London, 1841.

time. At the time of the inquiry he had derived no benefit: one of the *cestuis que vie* at the death of the testatrix was still in existence, and being still only twenty-nine years of age, he might very possibly survive the tenant for life; in which case the latter could never derive any actual benefit from the renewal. The interest of the plaintiff was that of beneficial owner of the estates for his own life; but that in itself afforded no guide in determining how much of the fine he should bear. It is clear, therefore, that the decision in *Allan v. Backhouse* is not founded upon the reasoning in *White v. White*, and is not in accordance with what it has been said is the modern rule of apportionment. The result of the decree was, that the tenant for life was made to bear 3132*l.* as his portion of the fines and expenses, and the remainderman 3724*l.*, and the costs of the suit, as his portion of the expense of the renewal, at a time when it was wholly uncertain whether one, or which of the parties would receive any benefit from the renewed lease (a). In *Greenwood v. Evans* (b), the trust was to renew "out of the rents and profits of the premises, or by mortgage thereof, if found expedient." The trustees renewed by inserting a new life in the

(a) The Master, by his report, in *Allan v. Backhouse*, 16th Dec. 1823, found that 6654*l.* 2*s.* 4*d.* was properly paid by the Plaintiff as the fine on renewal, and 202*l.* 5*s.* 10*d.* for the fees and expenses attending the renewal, making together 6856*l.* 8*s.* 2*d.*; that, with reference to the interest of the Plaintiff in the estates, the sum of 3132*l.* ought to be borne and paid by the Plaintiff as his proportion of

the 6856*l.* 8*s.* 2*d.*, which left 3724*l.* 8*s.* 2*d.*, which sum of 3724*l.* 8*s.* 2*d.*, together with 454*l.* 16*s.* 4*d.*, the costs of the several parties of the suits as taxed, &c., pursuant to the said decree, amounted to 4179*l.* 4*s.* 6*d.*, "which said sum of 4179*l.* 4*s.* 6*d.* is to be raised by sale or mortgage of a competent part of the said devised estates, pursuant to the directions of the said decree."

(b) 4 Beav. 44.

place of the testator, who was himself a cestui que vie with two others; and for this purpose they borrowed money on security. Two thirds of the rents went to one daughter, Mrs. *Evans's* trustees, during certain lives; the other third went to another daughter, Mrs. *Bowle*, for life. At the suit of the trustees, the Master of the Rolls declared that the sum paid for renewal was a charge upon the premises, and that the interest should be paid by the tenants for life; that the trustees of Mrs. *Evans* ought to bear a proportion of the charge with reference to the benefit derived by them from the renewal,—the amount of such benefit to be ascertained by the Master, who was also to state how the ultimate payment of such amount might be best secured or provided for, and whether the Defendant, Mrs. *Bowle*, derived any benefit from the renewal; and if so, to what amount, and how the same could be best secured or provided for. It does not appear that there was any reason for assuming that the trustees of Mrs. *Evans* had actually derived a benefit, which would not equally have applied to Mrs. *Bowle*; and the same observation applies, as in the last case, as to the difficulty of immediately determining the amount of the actual benefit which the parties might ultimately derive. The only other authority which it is necessary to notice, is that of *White v. White*. That case has not been cited as having, so far as its particular circumstances are concerned, any bearing on the present case, but it has been cited as containing some general observations of Lord *Eldon* on the apportionment of renewal fines. It must be remembered, that those observations were not directed to the case before him, and that to the most important of those observations for the present purpose,—the impossibility of determining the apportionment ab ante, without the risk of a wrong determination,—Lord *Eldon* did not himself attend in the subsequent

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case of *Allan v. Backhouse*. In this case the amount of the fines, both on the leases for lives and years, were wholly uncertain in amount, and it could not therefore have been the duty of the trustees to lay by annually any certain sum to provide for them. The case must be governed by the intention of the testator, so far as it can be gathered from the will, and the particular trusts indicate that the fines are to be raised by mortgage, as distinguished from the other charges on the premises. The trustees are, out of the rents and profits, yearly to pay the rents reserved,—and they are, out of the rents and profits, or by mortgage, or by such other ways as shall be advisable, forthwith to raise the renewal fines. The first direction obviously relates to annual rents and profits,—and the second to gross profits or corpus.

Mr. *Wetherell*, for the trustees.

6th May.

Judgment.

The VICE-CHANCELLOR (after adverting to the other points in the cause):—

The important question is that which is raised respecting the mode of providing for the fines on renewals. I think the cases of *White v. White* (a), *Allen v. Backhouse* (b), and *Greenwood v. Evans* (c), have clearly settled that no distinction was to be drawn, in considering this question, between leases for years and leases for lives. The principle may, in some cases, be more difficult of application to leases for lives than to leases for years, and there may be a difference in the mode of raising the fine, but still the question, as to the proportion and the manner in which the tenant for life

(a) 9 Ves. 554.

(b) 2 V. & B. 65.

(c) 4 Beav. 44.

and remainderman are to bear the charge, is clearly unaffected by that distinction. Treating both leases in this case as governed by the same principle, the question is as to the mode of raising the fund. I do not think there is, at the present day, any very great doubt as to the abstract rule in cases where the testator has by his will (as in this case) directed absolutely that the leases shall be renewed. In the absence of any direction by the testator as to the mode of providing the fines, the rule is, that the parties must bear the expense of renewal in proportion to their respective interests in the estate. In the present instance, the testator directed that the fines were to be renewed out of rents and profits, or by mortgage, or by such other ways and means as should be advisable; than which (without giving any opinion whether the words authorize a sale or not) it is scarcely possible to give a larger power. Setting aside for the present the question as to raising funds by anticipation for future renewals, and supposing nothing had been done by the trustees, the Court, if called upon to act, would have adopted the reasoning which is usual in cases of this kind. A direction that the fine should be raised by sale, without more, might be a strong argument for saying, that the corpus of the estate was to bear it, and that the entire estate was intended to be settled, subject to the subordinate direction that it was to undergo a perpetual diminution with a view to being otherwise preserved. The case of fines on the admission to copyholds better illustrates the effect of this mode of proceeding, for the estate must ultimately be consumed, and such may also be the effect with regard to leaseholds. But where there is a direction that the trustees shall raise the fine either by sale or mortgage, or by the application of rents and profits, or in any other mode which they shall think fit, there the effect,

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as between the parties, would obviously be different according to the mode which the trustees, exercising the power, might adopt. If they raised it out of the annual rents and profits, the manifest effect would be to throw the charge upon the party in possession, preserving the entire estate. If, on the other hand, they raised it by a sale, then the estate would undergo a diminution of so many acres, the tenant for life losing the rent of the portion sold, and the remainderman losing it in perpetuity. Where, however, the trustees not acting under the power, the Court is called upon to exercise a discretion, the effect of which, in one way, would be to throw the burden upon one party, and if the discretion be exercised another way to throw it upon a different party, and there is no reason for adopting one mode rather than the other, there the equitable rule would appear to be not to throw the burden more upon one party than upon the other, but to apportion it between them. This seems to me to be Sir *Thomas Plumer's* decision in *Allan v. Backhouse*, adopted I think by Lord *Langdale* in the case of *Greenwood v. Evans*. I cannot help thinking that where a testator points out different modes of raising the fines, all of which have reference to the convenience of the estate, it is inconsistent with the intention that the parties are to enjoy the estate in succession, that their rights should be altered by the manner of proceeding, unless there be an inevitable necessity for such alteration. I am far from thinking there are not difficulties in the case. I do not know how the Court can do otherwise, in justice, than treat the case as one in which there is no direction binding upon the Court, and direct the usual apportionment to be made. That view of the case is supported by the decision in *Allan v. Backhouse*, and other cases, and does not conflict

with the cases of *Playters v. Abbott* (a), and *The Earl of Shaftesbury v. Duke of Marlborough* (b). With respect to the anticipation as to future renewals, the theory appears to be, upon each renewal to look at the property as about to be purchased for the benefit of the settlement, and then to consider in what way the fine for the renewal is to be borne by the parties who are to enjoy the lease when renewed. That seems to be the effect of the case of *Greenwood v. Evans*.

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VICE-CHANCELLOR:—

May 30th.

I do not know that I can do more than state the conclusion to which I have come, after referring to the cases. I have not yet the actual state of the renewal question before me, in such a way, and with such accuracy, as to know what precise directions are to be given; but I will explain what my view is, that it may be applied to the particular facts. I stated at the conclusion of the argument my general view of the case. The only question I reserved was, as to the mode of apportioning the renewal fines between the tenant for life and the remainderman. By the mode, I do not mean their several proportions, but the manner in which I am to effect the apportionment. The general rule recognized by Lord Eldon, in *White v. White* (c), and followed in all the subsequent cases, as to the proportions in which a tenant for life and remainderman are to bear the expenses of renewal where there is no express direction of the testator, is, that they bear it in proportion to the actual enjoyment they have of the lease renewed. It is not necessary in this case that I should express an opinion whether there is any dis-

(a) 2 Myl. & K. 97.

(b) Id. 111.

(c) 9 Ves. 554.

arise under settlements by deed, and cases under wills; and I therefore abstain from expressing any opinion upon that point.

This case does not, in the first place, depend on the general rule. There is a direction given; and there being a direction, it must be followed. The testator has empowered the trustees, out of the rents and profits, or by mortgage, or in such other ways and means as they should think fit, to raise the necessary funds for renewing the leaseholds, some of which are held for lives, and others for years. The trustees might, perhaps, have so acted as to have thrown the burden in a manner not according with the general rule; and I do not mean to give any opinion whether, if they had done so, the Court would have interfered to alter the way in which the trustees had placed the burden. In this case, however, the trustees have not taken upon themselves to exercise the discretion which is given them by the will, and they have thrown it on the Court to exercise it. The Court, therefore, having a will before it in which no particular way is pointed out as preferable to another,—in which the trustees had power to have raised the fines out of rents and profits, or by mortgage or otherwise, as they thought fit,—the question is, how the Court is to act? I think that, in the absence of any special ground for departing from that course, the proper way is for the Court to raise it in such a manner as to equalize the burden among all the parties;—that is, according to the rule which the Court pursues in the absence of any special direction. I consider that a case in which the trustees have power to raise the fines in any way, but have thrown on the Court the execution of the trust, is a case in which the Court will pursue its own general rules. If I were to adopt one alternative

mode suggested by the words of the power, I might throw the whole burden of a fine on a tenant for life; and the effect might be, that he would enjoy substantially no benefit from the gift; if I adopt another alternative, and throw the burden on the estate, the effect may be equally unjust upon the remainderman. I think, therefore, the proper course is, to raise the fines in that way which will throw the burden on the parties in proportion to the interests they take in the leaseholds liable to the charge.

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Now the rule is, that the parties are to pay in proportion to their enjoyment; by which I understand their actual enjoyment to be meant, and not an extent of enjoyment to be determined by mere speculation, or by a calculation of probabilities; and the question is, how that apportionment is to be effected. If the tenant for life is willing to take upon himself to renew, it appears to me, according to the cases, there is very little difficulty in carrying out the transaction; he will enjoy the estate during his own life, and when the actual period of his enjoyment is ascertained, his estate will have a lien upon the residue of the term for any over-payment which may have been made. The tenant for life having paid the whole, if he has not the whole enjoyment, his estate will have a lien for whatever ought to be paid by the remainderman. The case is one of much greater difficulty where the renewal is made by or at the expense of the remainderman, or (which as to this difficulty is the same thing) where the trustee is to raise the money and charge it on the corpus. In that case, unless some course be taken to protect the interest of the remainderman, the tenant

Where the tenant for life pays the whole fine on renewal, he will have a lien on the estate for the proportion which shall ultimately appear to be chargeable on the remainderman, or parties entitled in succession; and where the remainderman renews, or the renewal is effected by means of a mortgage of the estate, the tenant for life may be required to give security to the remainderman for a proportionate part of the fine,

calculated upon the assumed duration of the life interest; and if that interest should endure longer than such assumed period, he may be required to give further security, without prejudice in either case to the actual amount which, at the determination of his interest, shall appear to be his due proportion of the fine.

out bearing any greater charge than the interest on the debt created by the renewal, and he may leave no assets to pay his proportion of the principal money. This is one of the difficulties noticed by Lord *Eldon* in *White v. White*. That inconvenience may perhaps be avoided by requiring the tenant for life to give security, a course to which Lord *Eldon* points in that case. The late cases of *Greenwood v. Evans* (a) and *Reeves v. Creswick* (b) are authorities which recognize the course of giving security as a course proper to be pursued where no other means are open for providing for a proper apportionment. It is not to be disputed, that there is a practical difficulty even in this mode of proceeding; the difficulty is in determining for what sum the tenant for life is to give security? If he gives security for the whole amount of the fine, because by possibility he may enjoy the whole benefit resulting from the renewal, the difficulty is got over; but the tenant for life may not be able to give security for the whole, although he might for a part; and how is the Court in such a case to deal with the interests of the parties? I do not mean to give any opinion as to the way in which the Court would proceed in cases that might be suggested, but, in considering what is proposed as a general rule, it is right not to disregard the inconvenience or difficulty which in some cases might arise in its application. I do not, however, think that the difficulty, to which I have adverted, is insuperable. The tenant for life may, in the first instance, be required to give security for an amount calculated upon the assumption that his life will last during a portion of the renewed lease. If he should die within the time during which it was assumed that his life would last,

(a) 4 Beav. 44.

(b) 3 You. & Coll. 715.

the security would of course be more than sufficient to satisfy his proportion of the fine, and it would be void for the excess. If he outlived that time, he might, if necessary, be called upon to give a further security to cover the additional proportion then to be attributed to him. In the case of *Allan v. Backhouse* (a) and other cases, it would appear that the party was not called upon in the first instance to pay the whole, but it was apportioned, and I presume on the principle that he should be required to pay the apportioned sum in the first instance, without prejudice to the question whether he might not ultimately be liable to pay more.

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It appears to me, being guided by the light which the cases afford me, proper to declare the rights of each party, as they are expressed by Lord *Eldon* in *White v. White*,—that is, to declare that each party is to bear the burden of the renewal in the proportion of his actual enjoyment of the estate. There will be a direction for the tenant for life to keep down the interest, and a reference, as in *Allan v. Backhouse* (a), to ascertain what proportion of the fine was properly payable by him. This inquiry is necessarily by anticipation. There will then be a reference, as in *Greenwood v. Evans* (b), for the Master to approve of a security, and these directions must be followed by a declaration, that the reference and security are to be without prejudice to the question whether the tenant for life may or may not be liable to pay less or more than the sum for which the security is given. I believe that decree will accord with the cases which have already been decided, and it appears to me to meet every consideration which arises on the case. There will be an additional complexity

(a) 2 Ves. & Bea. 65.

(b) 4 Beav. 44.

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in this case from the circumstance, that the fines have been hitherto paid out of a fund which confessedly was not liable to bear them, and which fund will therefore have to be indemnified.

Decree.

“AND it is ordered that the said Master do inquire and state what renewals have been made of the said testator's leasehold estates respectively, and when, and by whom, and out of what funds the fines, fees, and expenses attending such renewals, and each of them, have been paid. And this Court doth declare that the Defendant, *William Jones*, as tenant for life, ought to contribute to such renewals, and to the fines, fees, and expenses attending the same, in proportion to such benefit as he has derived or may derive from such renewals, and every or any of them. And it is ordered, that the said Master do inquire and state to the Court what sum ought to be paid, or secured to be paid, by the said *William Jones*, in respect of such his proportion, and what security he ought to give in respect thereof. But this direction as to such security is to be without prejudice to the question, whether the Defendant *William Jones* may not ultimately be liable to pay more or less than the sum for which the Master shall find that such security ought to be given.”

SHARLAND v. MILDON.

SHARLAND v. LOOSEMORE.

THE testator *George Sharland* died in January, 1842, leaving *Grace Sharland* his widow, a son and two daughters. One of the daughters was the Plaintiff, an infant. The widow died in November, 1842, intestate, and *John Loosemore*, who had been her solicitor, obtained letters of administration of her estate in February, 1843. The original bill was filed in August, 1844, against *Robert Mildon*, *John Hewish*, and against the son and the other daughter of the testator, stating that the testator had left two documents of a testamentary character, one of which was and the other was not executed; that *Robert Mildon* and *John Hewish* claimed to act as trustees of the real and personal estate of the testator, and praying that the will might be established, accounts of the real and personal estate possessed by the several Defendants taken, the estate duly administered, and a receiver and guardian appointed during the minority of the plaintiff. By a supplemental bill the Plaintiff stated, that it had been since discovered that *Grace Sharland*, the deceased widow, had not proved the will, or obtained letters of administration of the estate of the testator, and that the said will had not been proved until the 14th of February, 1845 when probate was granted to the Defendant *Robert Mildon*, during the minority of the Plaintiff. Th

widow, inasmuch as the acts of the widow and *A.*, in reference to the were the acts of wrong doers, and the law does not recognize the relation as existing amongst wrong doers.

That *A.* was liable as executor de son tort to account to a party testator's estate, in a suit for that purpose, without any charge of collusion between the executor de son tort and the legal personal representative.

Mildon, and *John Hewish*, had jointly or severally acted in the administration of the testator's personal estate prior to the grant of probate, each of them had acted therein as an executrix or executor de son tort, and as such become liable to account to the Plaintiff for the assets of the testator possessed or received by themselves respectively, or by any of them respectively, by means of the agency of the others or other of them. The supplemental bill also charged the Defendant *John Loosemore* with having acted both before and since the probate of the testator's will in respect of the estate, and charged him in like manner as liable, as executor de son tort, to account to the Plaintiff; and it prayed that the Defendant *Loosemore*, as the representative of *Grace Sharland*, and that each of them *Loosemore*, *Mildon*, and *Hewish*, respectively, so far as he had possessed the testator's personal estate prior to the grant of probate of the will, might be declared personally liable as executor de son tort, and be decreed to account, and make good accordingly what he had so received.

John Loosemore by his answer admitted, that, acting professionally for *Grace Sharland*, he had received a debt of 5*l.* 5*s.* due to the estate of the testator, and that since her decease he had sold certain articles of furniture and wearing apparel belonging to the testator's estate which were in the possession of *Grace Sharland* at the time of her death, and which had produced about £50; and the Defendant submitted to the Court the question, whether he was thereby liable as executor de son tort.

John Hewish by his answer admitted, that shortly after the decease of the testator, at the request of

Grace Sharland, his widow, and of his son and heir at law, he (*Hewish*) took up his abode with the said *Grace Sharland* for some time, and at her request, and as her agent, and in her name, applied personally to some of the debtors of the said testator, and received from some of them the amounts of their respective debts, or some sums on account thereof, for the purpose only of being handed over to *Grace Sharland*, and all which sums he immediately handed over to her accordingly, he acting therein merely as a messenger between *Grace Sharland* and the said debtors. The Defendant *John Hewish* also stated, that he had in his possession an account or memorandum book of the testator which was delivered to him by *Grace Sharland*, and which was then in the possession of her personal representative, and in such book were entries, made by him (*Hewish*), of debts and sums so received by him, and also of debts received by *Grace Sharland* herself. The Defendant *Hewish* said that, after referring to the book, he had set forth a list of the sums so received by him as such agent or messenger, and also by *Grace Sharland*, and he stated that some of such sums were received by her in his presence, and others she informed him that she had received, and although he believed such lists to be imperfect, he was unable to set forth any other account. The Defendant said that *Grace Sharland* had represented to him, and he believed, and acted in the belief, that she had actually obtained letters of administration of the testator's estate: he submitted that what he so did was not sufficient to make him executor de son tort, or to fix him with any personal liability.

1846.

SHEARLAND
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SHEARLAND
v.
LOOSEMORE.

Statement.

Mr. *Greene*, for the bill, argued that by the receipt of monies owing to the estate of the testator (knowing

Argument.

1846.

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Argument.

that they belonged to such estate) each of the Defendants had become liable to be charged as executor de son tort: *Padget v. Priest* (a). Having incurred that liability, they could only discharge themselves of it by accounting to the legal representatives, and that the Defendants had not done. The liability could not be avoided by the suggestion that the Defendant acted as agent for another person, for in tort every party was a principal: *Stephens v. Elwall* (b), *Snowdon v. Davis* (c).

Mr. *W. M. James*, for the Defendant *Hewish*, argued, first, that he was a mere servant or agent of the widow, who was entitled to be, and was, as he supposed, the administratrix or legal representative of the estate of the testator; and that he had done nothing more than obey the directions of or assist the widow in securing the estate of the testator which was dispersed in various hands. If *Hewish* was chargeable for his acts in this case, it would be impossible for any person to render the most common act of friendship to a family upon the death of the father or husband,—at least if such act were connected with the property of the deceased,—without becoming liable as executor de son tort. The principle would even extend to the case of domestic servants; and services performed in the house, and useful for the preservation of the furniture or movables of a deceased person, might render the servant, by whom they should be done, liable to be sued as in the present case. The Defendant in this case had duly accounted to the party by whom he was employed, and that party or her estate was answerable for his acts. Even supposing that *Hewish* was liable in the alleged character, the question was, to whom was

(a) 2 T. R. 97.

(b) 4 M. & Sel. 259.

(c) 1 Taunt. 359.

he liable? The Plaintiff was entitled to sue the legal representative, and to charge the legal representative, not only with what he had received, but what, without his wilful neglect or default, he might have received; and if there were monies outstanding in the hand of an executor de son tort, which the legal representative omitted to recover, that was a default for which the latter would be responsible; but the executor de son tort was, at the utmost, only a debtor to the estate, and was not liable to be sued by any other person than the legal representative, unless the bill was founded on collusion between the representative and the debtor, which raised a distinct equity, and collusion was not charged by the bill.

1846.
 SHARLAND
 v.
 MILDON.
 SHARLAND
 v.
 LOOSEMORE.
 —
Argument.

VICE-CHANCELLOR:—

June 4th.
 —
Judgment.

The widow of a deceased person,—the testator in the cause,—intending to obtain representation to her husband, began to collect his assets before she had obtained such representation, and in the course of doing so she employed the Defendant *Hewish* to collect the debts owing to the testator. *Hewish* accordingly received several of the debts, knowing them to belong to the testator's estate, and paid them over to the widow. The widow did not afterwards become the legal representative of the testator, and another party has obtained such representation. The consequence is, that the widow might without question be sued as executrix de son tort. The question is as to *Hewish*. The case of *Padget v. Priest* (a) appears to be an authority for the proposition, that if *Hewish* in this case had not paid over the money which he received, but had retained

(a) 2 T. R. 97.

cutor de son tort. It does not appear clearly from the report of that case, whether that was the precise ground upon which the judgment went, but according to the marginal note it seems to have been the point decided. One judge, Mr. Justice *Buller*, however, appears to have expressed a doubt whether the party, if he had been a mere servant, would have been liable. The case, in the present instance, is one of great hardship on Mr. *Hewish*, and I desired to look into the case, to see if I could avoid treating him as executor de son tort. The fact that he would be liable if he had received the money, and had not paid it over, is admitted, or well established; and if that be so, it seems to follow logically that the Defendant cannot discharge himself, except by paying over to the legal personal representative of the testator the money which he has so received. *Hewish* might have acted in this case purely in a ministerial character, as, for example, a servant might have acted in bringing or removing furniture under the direction of his employer; but the authorities clearly shew that the doctrine,—that the possession of an agent is the possession of a principal, has no application to the case of a wrong doer: *Stephens v. Elwall*(a), *Snowden v. Davis*(b). Although, therefore, the rule operates severely in this case, *Hewish*, who in the act in question was a wrong doer, must remain a party to the suit.

(a) 4 Mau. & Sel. 250.

(b) 1 Taunt. 359.

5th, 6th, 7th,
& 13th Nov.

IN September, 1842, *David Jones*, as principal, and *John Powell*, as surety, were indebted to the *Monmouthshire and Glamorganshire Banking Company*, in the sum of 650*l.*, in respect of several promissory notes which *David Jones* had made, and *John Powell* had indorsed to the banking company. *David Jones* was at the same time indebted to *John Powell* in the sum of 1800*l.*, which was secured by an indenture of mortgage dated the 21st of June, 1841, made by *David Jones* to *John Powell*, of certain parcels of lands, messuages, and premises, at *Tredegar*, in the county of *Monmouth*, subject as to part thereof to a prior mortgage to *Thomas Parry*. *David Jones* was also indebted to the banking company in other sums of money.

P. being indebted to *B.* makes a mortgage of an equity of redemption of real estate to *B.* for the purpose of securing the debt, and, by the indenture of mortgage, it was falsely recited, that the mortgaged estate was subject to an equitable charge for monies due to *J.*, secured by the deposit of a deed. *P.* retained the deed in his own possession, and subsequently deposited it with *J.* as a security for money partly lent to *P.* by *J.* before, and partly after, the mortgage of the estate to *B.* *J.*, at the time of the deposit, had no notice of the prior mortgage to *B.* — *Held*, that inasmuch as an actual prior charge on the estate, if afterwards paid off by *P.*, or otherwise avoided,

By an indenture, dated the 8th of September, 1842, made between *John Powell*, of the first part, *David Jones*, of the second part, and two persons as trustees of the banking company, of the third part, reciting the mortgage of the 21st of June, 1841, and reciting that the said sum of 1800*l.*, with an arrear of interest, was still owing to *John Powell* from *David Jones*; reciting also “that *John Powell*, on or about the 7th of February, 1842, deposited the last-recited indenture of mortgage with *John Jones*, as collateral security for the repayment of the sum of 1000*l.* due to him from *John Powell* on bond, and the interest thereon;” and reciting that *Da-*

would have left *B.* in the position of the first mortgagee of the equity of redemption,—the recital of a charge, which had in fact no existence, could not have the effect of postponing *B.*

That the interest acquired by *J.*, by the subsequent mortgage by way of deposit, could not be enlarged by the effect of the false recital, and was only an interest in the equity of redemption, subject to the mortgage to *B.*; and that *B.*, in a suit for that purpose, was entitled, as against *J.*, to the ordinary decree for payment or for foreclosure, and delivery up of the deed on default.

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 {
 FRAZER
 v.
 JONES.
 —
 Statement.

vid Jones and John Powell, as his surety, were indebted to the banking company in the said sum of 650*l.*, for money lent and advanced, and that it had been agreed between the parties thereto that the repayment thereof with interest should be secured by the assignment and conveyance, and in manner thereafter mentioned; the said *John Powell* bargained, sold, and assigned unto the said trustees for the banking company, their executors, administrators, and assigns, the said sum of 1800*l.*, and the said indenture of mortgage, and all other deeds for better securing the same; and the said *John Powell*, with the privity and consent of *David Jones*, thereby also bargained, sold, and assigned, granted and confirmed unto the same trustees, their executors, administrators, and assigns, the said parcels of lands, messuages, and premises, subject, as to part of the said premises, to the said mortgage to *Thomas Parry*, and as to the whole thereof, "to the equitable right and interest acquired by the said *John Jones* by virtue of the deposit with him of the said mortgage-deed of the 21st of June, 1841, as collateral security for the payment of the sum of 1000*l.* and interest, as thereinbefore mentioned," subject nevertheless to a proviso for redemption of the said premises, on payment by *David Jones* and *John Powell*, or either of them, to the said trustees for the banking company, their executors, administrators, and assigns, of the said sum of 650*l.* and interest, as therein mentioned. The deed contained a power of sale of the mortgaged premises by the mortgagees in case of default of payment by the mortgagors, and covenants by the mortgagors for payment of the 650*l.* and interest, and by the mortgagees not to exercise the power of sale, in case of payment being made as therein mentioned.

In the year 1841, *David Jones* had become indebted to *John Jones* in the sum of 87*l.* On the 20th of Sep-

tember, 1842, *John Jones* lent to *John Powell* a sum of 113*l.*, and *John Powell* gave his bond for 200*l.* to *John Jones*, and also deposited with him the said deed of the 21st of June, 1841, with a memorandum of deposit to the effect that the deed was to be held by *John Jones* as an additional security for the 200*l.* and interest.

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JONES.
Statement.

On the 5th of October, 1842, the banking company gave both *Thomas Parry* and *John Jones* notice of the mortgage of the 8th of September, 1842, made to the trustees for the bank.

The bill was filed by the public officer of the banking company and the trustees for the company, who were parties to the mortgage-deed of the 8th of September, 1842, against *John Jones*, *David Jones*, and *John Powell*. The bill alleged that the Plaintiffs had recently discovered that the deposit of the deed of the 21st of June, 1841, with *John Jones*, did not take place until after the date of the mortgage of the 8th of September, 1842; that the 1000*l.*, mentioned in the recital of the last-mentioned deed as being due to *John Jones*, had never been in fact owing; and that *John Jones* had no equitable right or interest in the premises by virtue of the deposit. The bill prayed that *John Jones* might be decreed to deliver up to the Plaintiffs the deed of the 21st of June, 1841; and if it should appear that he had any interest in the premises under the bond and memorandum of deposit made on the 20th of September, 1842, that such interest might be declared to be subject to the mortgage to the banking company; that the Defendants might be decreed to pay to the Plaintiffs what should be found due to the banking company on their said mortgage, with costs; or in default, that the Defendants might be foreclosed, and might deliver over to

Statement.

ing to the premises; and might also be decreed to pay to the Plaintiffs the costs of the suit.

The Defendant, *John Jones*, denied any knowledge of the recitals in the deed of the 8th of September, 1842, and he admitted that the 1000*l.* was not due to him: he claimed, however, the benefit of the deposit of the deed of the 21st of June, 1841, as a security for the 200*l.* and interest; and denied an allegation made in the bill, that at the time the deposit was made he had notice of the mortgage to the bank of the 8th of September, 1842.

Argument.

Mr. Wood, Mr. Rolt, and Mr. Whitbread, for the Plaintiffs.

Mr. Romilly and Mr. Bush, for the Defendant *John Jones*, argued that he was entitled to a charge upon the property, in priority to the bank, to the extent of the actual amount of the debt due to him. The bank, by means of the recital in their security of the 8th of September, was informed of the existence of an equitable interest in *John Jones*; that information might have been true or false, but still it was information given to the bank. There were two courses open to the bank,—either to take the recital as a fact, and submit to be bound by it, or to verify its truth by inquiry of the party in whom the alleged interest, prior to that of the bank, was said to be vested. They did not take the latter course, and by not taking it they permitted the mortgagor to commit a fraud on the party to whom the alleged interest was given, which would not have happened if the inquiry had been made. This was such

wilful blindness or laches on the part of the bank, that they must be bound, by the recital, to stand as mortgagees, subsequent to the amount of the debt due to the Plaintiff not exceeding the 1000*l.* mentioned in the recital: *Head v. Egerton* (a), *Evans v. Bicknell* (b), *Stanhope v. Earl Verney* (c), *Wilnot v. Pike* (d), *Hiera v. Mill* (e), *Jones v. Smith* (f), *Whitbread v. Jordan* (g), *Taylor v. Baker* (h), *Maundrell v. Maundrell* (i).

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v.
JONES.
Argument.

Mr. *Humphrey* for the other Defendants.

VICE-CHANCELLOR:—

There appears to me to have been great misconduct on the part of some of the parties. The bank, who are creditors of *David Jones* and *Powell*, require them to give a security; and thereupon *David Jones* and *Powell* represent to the bank that the property which they proposed to give as security for the debt owing to the bank, was subject to a charge in favour of a person of the name of *Parry*, which was true; and subject to another charge of 1000*l.*, in favour of *John Jones* the Defendant, which was untrue. It is true that the bank, at the time this transaction took place, had no right to call for a specific security, but they had a right to take proceedings to enforce the payment of the debt. Now I certainly do not desire that any expression used at the bar should be qualified with regard to those who made the untrue representation. Whether it was a legal

Nov. 7th.
Judgment.

(a) 8 P. Wms. 280.

(b) 6 Ves. 174.

(c) 2 Eden, 81.

(d) 5 Hare, 14.

(e) 13 Ves. 114.

(f) 1 Hare, 43.

(g) 1 Y. & Coll. 303.

(h) 5 Price, 306.

(i) 10 Ves. 270.

1846.

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v.
JONES.

Judgment.

fraud or not, the false representation was a moral fraud. It appears that a security was taken by the bank for the debt owing by *David Jones* and *Powell*, ostensibly subject to this charge of 1000*l.* said to be owing to *John Jones*. The effect of this was, that *Powell*, who, if he had told the truth, would have been called upon to give up his mortgage-deed of June, 1841, for 1800*l.*, was enabled to keep the deed in his possession, and by means of that possession afterwards to commit a fraud on *John Jones*. If I exclude the suggestion which has been made in the bill, that *John Jones* was a party to the fraud which was practised on the bank, it is the simple case of two innocent parties, one of whom is to suffer by a fraud committed by a third; and the only question is, which of the two equities is to be preferred? It seems to me the question must ultimately come to this,—what interest had *Powell* to dispose of, on the 20th of September, when he professed to give the security to *John Jones*. If there had been a mortgage to *John Jones* on the estate at the time, according to his statement, and *Powell* had afterwards paid off that security,—not attempting to do anything to keep it alive in his own favour, as to the effect of which I do not give any opinion, it would have let in the other mortgage. It may, in this case, be open to a question, whether, in truth, there was any charge on the estate,—whether, the moment after the deed of the 8th of September was executed, *Powell* had any interest whatever in the estate in priority to his own mortgagee, the bank, although the bank had agreed to take the security minus the 1000*l.*; then comes the question, how *Powell* could transfer to *John Jones* more than he had himself?

VICE-CHANCELLOR:—

The position of the parties in this cause is this:—If I give the Defendant, *John Jones*, priority over the Plaintiffs, I shall not, by so doing, deprive the Plaintiffs of the value of any part of the security which they contracted for, and supposed they had acquired. I shall in effect give to each party what he contracted for, and regarded his security as giving him; the truth being, that the Plaintiffs are contending for the benefit of a rule of law, which they say entitled them to a better security than they expected to obtain. If, on the other hand, I give the Plaintiffs the benefit of the rule they claim, I shall put the Defendant in no worse position than that in which every equitable mortgagee finds himself who advances his money in ignorance of a prior charge. I think, however, that I am bound to consider, —and perhaps more strictly in a case like this, what are the strict rights of the parties. My opinion is, that the Plaintiffs are entitled to the priority which they claim. If *John Jones* had taken the security which the mortgagor stated that he had, and the mortgagor had afterwards paid off that charge, the extinguishment of the charge would, beyond all dispute, have enured to the benefit of the Plaintiffs. So, also, if *John Jones* had had the charge, and the charge had been avoided as being illegal, or on any other ground, either by the act of the mortgagor, or by the act of the Plaintiff. For both these propositions there is clear authority. And the principle of the decisions is, that the mortgage, as between the mortgagor and the mortgagee, is a mortgage of the mortgagor's entire interest, saving only the rights of prior incumbrancers. If in this case *John Jones* had not intervened, I cannot entertain a doubt that the whole of the mortgagor's interest was pledged to the

1846.
 {
 FRAZER
 v.
 JONES.
 —
 Nov. 13th.
 Judgment.

1846.

FRAZER

v.

JONES.

Judgment.

Plaintiffs by the mortgage of the 8th of September, 1842. The conclusion is, that after executing that mortgage, the mortgagor had no interest, legal or equitable, in the mortgaged premises in priority to the Plaintiffs,—nothing, in fact, which, in equity, he could transfer to *John Jones*. The priority must be determined by the dates of the advances, and the case in the Plaintiffs' favour is certainly not the less strong, if *John Jones* (as he says) had no notice at the time of his advance of the Plaintiffs' security; for, on that supposition he cannot by possibility have been misled by the form of their security.

A question was raised respecting the costs occasioned by the allegation in the answer of *John Jones*, that he had no notice of the Plaintiffs' charge at the time he advanced his money,—the Plaintiffs contending that he had such notice, and much evidence having been gone into on that point. Now, it appears to me that this issue was immaterial on the merits. The only question in the cause is, whether the mortgagor, after the execution of the mortgage of the 8th of September, 1842, retained any interest in the mortgaged premises as against the Plaintiffs, which he could make the subject of the security to *John Jones*. That question is quite independent of the question of notice. If the mortgagors had retained such an interest, the mortgage would be good whether *John Jones* had notice of it or not. If they had no notice, of course the same conclusion must follow. The issue appears to me to be equally immaterial on the question of costs. The knowledge of *John Jones*, at the time of the filing of the bill, and not his knowledge at the time of taking his mortgage, is the material question. The issue, therefore, being immaterial, both on the merits and

with a view to the costs, I cannot make *John Jones* pay the costs of the litigation to which it has led.

With respect to the general costs of the suit, excluding the above costs, I cannot, on the general ground that *John Jones* is a second mortgagee, with notice of a prior charge, order him to pay the costs of the suit. To give them upon that principle would be to establish that, in every case, the first mortgagee has a right to contend that the second mortgagee, taking the benefit of a decree in a suit, should pay the costs, and not that the costs should, as in the ordinary case, be added to the mortgage-debt, and made a charge upon the estate. In the circumstances of this case, I think that the common order is the proper order to be made. It is true that some extra costs may have been occasioned by the question raised in the cause between the Plaintiffs and *John Jones*, for at the hearing there was a more material question to argue than otherwise there would have been. I think, however, that the nature of the question and the circumstances of the case are sufficient to justify me in making the common order. There will be a declaration that the Plaintiffs are entitled as the first mortgagees, adding their costs to the debt, and then a decree for foreclosure on default in the usual way. In case of foreclosure, the Defendant must deliver up the deed.

1846.
 FRAZER
 v.
 JONES.
 ———
Judgment.

March 22nd.
April 19th.

A bequest to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain, held to be valid so far as related to the pure personalty, but void in respect of the personalty savouring of realty.

Statement.

NIGHTINGALE v. GOULBURN.

COLONEL PETRIE, by his will dated in July, 1843, bequeathed several legacies,—gave an annuity of 200*l.* to his widow for her life,—and, after the decease of his widow, disposed of his residuary estate in the following words: “I now desire that my said trustees or trustee shall convert all and singular my investments in the stocks, funds, and other securities into money, and do and shall pay such money, and all other trust monies whatever, remaining not disposed of after payment of all and every the legacies, bequests, donations, and sums of money aforesaid, and all expenses attending the execution of the trusts of this my will, to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country, Great Britain.”

The Master found that the estate of the testator, at the time of his death, consisted of certain stock in the public funds, therein stated [which amounted together to about 20,000*l.*], being pure personalty; and to a sum of 300*l.* due upon mortgage. The parties to the suit, on further directions, were the trustees of the fund, the Chancellor of the Exchequer, the Attorney-General, and the next of kin of the testator.

Argument.

Mr. Twiss and **Mr. Wray**, for the Chancellor of the Exchequer and the Attorney-General.—The bequest is valid, being made to an officer of the Crown for general public purposes. The only decree which the Court will make is, that the fund shall be paid to the Chancellor of the Exchequer, and in his hands it will be under

other funds in the public treasury. This relieves the case from any uncertainty, with respect to the objects of the gift, and renders it unnecessary to determine whether the purposes are or are not charitable in the more strict sense of that word: *Middleton v. Spicer* (a), *Newland v. Attorney-General* (b). It is sufficient that the fund must be devoted to a public general purpose (c). No application of these funds to more restricted purposes would be permitted. The Court will assume, in a case where the public benefit is the expressed object and a high officer of the Crown is the administrator of the trust, that the public and general good must be pursued in the distribution of the fund. The question has in fact been determined by authority, in the case in which a gift for the benefit of the native inhabitants of Dacca was supported: *Mitford v. Reynolds* (d). If a gift for the benefit of a particular town can be sustained, it cannot be said that a gift for the benefit of a particular country is too indefinite. To obviate any question on the ground of the bequest being within the Statute of Mortmain, the Crown may waive any claim to the fund produced by the personal estate owing upon the mortgage.

Mr. Romilly, Mr. Hallett, and Mr. Bell, for the several next of kin of the testator.—In this case, as well as every other, in order to support the bequest it must be shewn that some definite persons or objects are intended to enjoy the benefit of the gift. The gift is to the Chancellor of the Exchequer; it is admitted not to be for his own benefit; the question then is, what is the trust? The question is not answered by referring to the character

(a) 1 Bro. C. C. 201.

(b) 3 Mer. 684.

(c) 1 Sim. & St. 66.

(d) 1 Phil. 185.

the duties which he has to perform, or to the fact that the funds under the jurisdiction of the public exchequer are applied to the public benefit. The funds in the public treasury are in part applied for the benefit of *Ireland*, but *Ireland* is not an object of the testator's bounty. The trust must, therefore, be for some public purposes less comprehensive than those for which the Consolidated Fund is applicable; but there is no guide afforded by the will for selecting those purposes. The objects of the testator's bounty are therefore entirely undefined and uncertain. In the case of *Newland v. Attorney-General*, the object was distinct and definite. If, in this case, the Chancellor of the Exchequer declined to undertake the trust, the Court could not execute it: *Kendall v. Granger* (a), *Ommanney v. Butcher* (b), *Morice v. The Bishop of Durham* (c), *Vezey v. Jamson* (d), *Brown v. Yeall* (e), *Williams v. Kershaw* (f), *Miller v. Rowan* (g), *Ellis v. Selby* (h), *Attorney-General v. Brown* (i).

Judgment. VICE-CHANCELLOR:—

The question is, whether this bequest can be supported as a charitable bequest; or whether the property comprised in it is undisposed of, and as such is distributable amongst the next of kin of the testator?

The argument in favour of the Attorney-General was, that the bequest being for the benefit of the country at large, no application of the fund would be lawful other

(a) 5 Beav. 300.

(b) 1 T. & R. 260.

(c) 9 Ves. 399.

(d) 1 Sim. & St. 69.

(e) 7 Ves. 50, n.

(f) 1 Keen, 232, n.

(g) 5 Cl. & Fin. 99.

(h) 1 Myl. & Cr. 286.

(i) 1 Swans. 285.

than for a general public purpose; and that every such an appropriation for a general public purpose would be a charitable use within the statute of Elizabeth. The argument for the next of kin was, that the words of the bequest are so general as to admit of the application of the property by the trustee to purposes not charitable, within the construction of that term adopted in the decided cases. If it can be shewn that the trustee could have such a power as that which it is suggested on the part of the next of kin that he would have, the case is at an end; but, to assume that, would be to take for granted the very point in dispute.

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 NIGHTINGALE
 v.
 GOULBURN.
 Judgment.

I do not understand the observations of Sir *W. Grant*, in *Morice v. The Bishop of Durham* (a), as deciding that no general words could be equivalent to the word "charity;" nor do I think it would be right, with reference to the decided cases, to lay down any such general rule. In *West v. Knight* (b), a bequest "to the parish of Great Creaton," was held to be a charitable bequest, to be applied for the benefit of the poor of the parish named, upon the express ground that it was within the statute of Charitable Uses. In *Jones v. Williams* (c), it was held by Lord *Camden*, that any general public purpose, extending to the poor as well as to the rich, was a charitable use within the statute. In *The Attorney-General v. College of William and Mary* (d), the testator bequeathed the residue of his estate to be laid out for "charitable and other pious and good uses, at their discretion," and it was held a valid charitable bequest; and upon the authority of that case, a bequest of 2000*l.*, to be laid out until the testator's son came of age, in purposes expressed no

(a) 9 Ves. 406.

(b) 1 Cas. in Ch. 134.

(c) Ambl. 651.

(d) 1 Ves. jun. 243.

Lord and Master, and, I trust, Redeemer," was held a good charitable bequest: *Powerscourt v. Powerscourt*(a); though it was argued that private charity would satisfy the bequest. In *The Attorney-General v. Heelis*(b), Sir John Leach, referring to the case of *The Attorney-General v. Brown*(c), as a case in which he had occasion to consider the subject very fully, said, it was his opinion, that funds supplied from the gift of the Crown, or of the Legislature, or from private gift, for any legal, public, or general purpose, were charitable funds, to be administered by courts of equity; and that it was not material that the particular public or general purpose was not expressed in the statute of Elizabeth, all other legal, public, or general purposes being within the equity of that statute. That case was the subject of observation before Lord Eldon, in *The Attorney-General v. The Mayor of Dublin*(d); and what was there said again became the subject of observation by the Vice-Chancellor in *The Attorney-General v. The Mayor and Corporation of Carlisle*(e). I do not, however, collect from those cases that the law laid down in *The Attorney-General v. Heelis* was disapproved of by Lord Eldon, but that the law, as laid down in that case, if correct, tended to shew, that, in *The Attorney-General v. Brown*, Lord Eldon had felt unnecessary difficulties in deciding the case.

In the *Attorney-General v. The Earl of Lonsdale*(f), property was given by a testator upon trust for a school in *Louthor*, in the county of *Westmoreland*, or otherwise, upon such trusts, and for such other purposes as his executors should think most conducive to the good of the county of *Westmoreland*, and especially of the parish of

(a) 1 Moll. 616.

(b) 2 Sim. & Stu. 67.

(c) 1 Swanst. 265.

(d) 1 Bligh, N. S., 334.

(e) 2 Sim. 437.

(f) 1 Sim. 105.

Lowther. The charity as to the school altogether failed, but the Court nevertheless held the bequest to be good, and directed the property to be applied to other charitable purposes for the benefit of the county. Had the words of the bequest been, "or otherwise upon such trusts and for such other purposes as my executors shall think fit," then, according to the cases cited in argument, the gift could not have been supported as a charity. But the terms of the gift in fact amounted merely to a direction to apply the property for the good of the county, without making use of the word "charitable." In *Mitford v. Reynolds* (a), the testator bequeathed the residue of his property "to the government of Bengal, for the express purpose of that government applying the amount to charitable, beneficial, and public works at and in the city of Dacca, in Bengal, the intent of such bequest and direction being, that the amount shall be applied exclusively to the benefit of the native inhabitants in the manner they and the government may regard to be most conducive to that end." Now, if the words "charitable, beneficial, and public" in that case are to be read collectively, there is no question that charity would govern the whole of the bequest. If, however, they were to be taken distributively, so that the government might apply the funds either to charitable, or to beneficial or public works, without reference to charity, there would be an end to the argument. The *Lord Chancellor*, in delivering judgment, says, that, in the latter case, there could be no doubt that the whole disposition would fail; but, taking the whole together, he considers the meaning to be, that the money shall be applied to works,—something to be constructed or established for the benefit of the native inhabitants of Dacca,—not for any particular class of the native inha-

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(a) 1 Phil. 185, 706.

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rich and poor; and he holds it to be, within all the authorities, a valid charitable bequest. The *Lord Chancellor* does not construe the word "charitable" as governing the whole of the bequest; but respecting that word, he says that the bequest is for the benefit of all the native inhabitants in general, both rich and poor, and that it was, therefore, good. I do not think anything turns on the point, as to the application of the fund in building works, as distinguished from any other mode of application.

In the case of *Newland v. The Attorney-General* (a), in which there was a bequest of stock to her Majesty's Government in exoneration of the national debt, Lord *Eldon* directed the fund to be transferred to such person as the king, under his sign manual, should appoint. The cases of *Horse v. Chapman* (b), *Townley v. Bedwell* (c), which are cited in *Mitford v. Reynolds*, in explanation of that judgment, are also important upon the question raised in this case by the argument on behalf of the next of kin.

It was said, however, that if I should decide against the claim of the next of kin, my decision would be opposed to that of Lord *Langdale*, in *Kendall v. Granger* (d). I am not of that opinion; I agree with Lord *Langdale*, that many things of general utility may not fall within the definition of charity, as the term is understood in the Court; for many things of general utility may be strictly matters of private right, although the public may indirectly derive a benefit from them. The expenditure of money to promote the construction of railroads or canals (for example), which are private

(a) 3 Mer. 684.

(b) 4 Ves. 542.

(c) 6 Ves. 194.

(d) 5 Beav. 300.

General, might often be an expenditure in the encouragement of things of general utility, but could not be said to be an expenditure for a charitable purpose. But this case is distinguishable from that of *Kendall v. Granger*. This is not simply a bequest to trustees for purposes of a general and wholly unrestricted nature, but for the benefit and advantage, that is, for the good of a particular class,—a large class, it is true, but still a class coming within some defined limits, and which is within the decision in *Mitford v. Reynolds*. If a bequest were made to a trustee to be appropriated, at his discretion, for the benefit and advantage of *A. B.*, that would in equity be a bequest to *A. B.* The *British* public, in this case, stand in the situation of *A. B.* in the case I have supposed; but it has not been argued, that that difference alone was fatal to the bequest.

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I am of opinion that this bequest is valid, unless it can be shewn that the Chancellor of the Exchequer may, consistently with the trust under the will, appropriate the fund to purposes in which the *British* public have no direct and immediate interest,—no interest except incidentally and indirectly,—or that he is at liberty in fact to appropriate it to any other than such general public purposes as the Attorney-General might protect and control. I cannot conceive a purpose to which these trust funds could be lawfully applied, according to the will, which would not be so general and public in its character as to constitute a charitable use. The case is certainly open to doubt; but the conclusion to which I have come is, that the bequest is valid.

Decree as in Seton on Decrees, p. 128, No. XIV.

May 8th.

STEED v. OLIVER.

An order *ex parte* may be obtained by a defendant for leave to examine a co-defendant, saving just exceptions, —as well after the decree, as before the hearing; and the question of the competency of the witness will not be tried upon motion to discharge the order, but is open when his evidence is tendered.

Argument.

MR. Romilly and Mr. Pryor, for the Plaintiff, moved to discharge, for irregularity, an order obtained, *ex parte*, after the decree, by two of the Defendants, for leave to examine a Co-defendant, in support of the state of facts which the two Defendants had carried in before the Master.

The motion was supported in argument on two grounds; first, that the order to examine a co-defendant, after decree, ought not to have been obtained *ex parte*, but that a special application was then necessary; secondly, that the suggestion upon which the common order is made, that the party to be examined has no interest in the matters in question in the cause, was, in this case, untrue, inasmuch as it appeared upon the pleadings and decree, that the Co-defendant, who was the proposed witness, was a co-executor with the other Defendants, and, therefore, an accounting party in the suit. The witness was, therefore, incompetent, and the objection was not removed by the stat. 6 & 7 Vict. c. 85.

Mr. Eade opposed the motion.—The order was regular, after as well as before the decree: *Paris v. Hughes* (a), *Van v. Corpe* (b). The objection as to the competency of the witness could not be raised on this motion, but was open to the Plaintiff when the evidence was tendered: *Lee v. Atkinson* (c), *Murray v. Shadwell* (d).

Judgment.

The VICE-CHANCELLOR said, the cases cited appeared to be conclusive on the point.

Motion refused, with costs.

(a) 1 Keen, 1.

(b) 3 Myl. & K. 269.

(c) 2 Cox, 413.

(d) 2 V. & B. 401.

Feb. 26th,

27th.

March 17th.

THE bill, which was filed in December, 1846, by *Matthew Kirwan*, against *Thomas and John Daniel*, *John Francis Kirwan*, *M. Hale*, and *H. Smith*, stated an indenture, dated in March, 1841, made between the Plaintiff, of the first part, *John Francis Kirwan* of the second part, and *M. Hale* and *H. Smith* of the third part, whereby, for certain considerations, and among others, in consideration of an annuity of 300*l.* to the Plaintiff for his life, and another annuity of 100*l.* to *Sarah Kirwan*, commencing at the decease of the Plaintiff, for her life, (which annuities *John Francis Kirwan* covenanted to pay), certain plantations in *Montserrat* were conveyed to *M. Hale* and *H. Smith*, and their heirs, to the use and intent that the Plaintiff and *Sarah Kirwan* might receive and take out of the said plantations such several annuities, as the same should become due; and subject to the said charges and certain other charges thereon, to the use of *John Francis Kirwan*, his heirs and assigns.

The Plaintiff being entitled to an annuity of 300*l.* charged upon plantations in the *West Indies*, belonging to *K.*, entered (as agent for *K.*) into an agreement with *D.*, by which *D.* in consideration of having the produce consigned to him until his advances were satisfied, was to ship supplies to the plantations, and honour bills drawn upon him *D.* by *K.* for the expenses of management, and also to pay the Plaintiff's annuity. The consignments were made, and *D.* paid the Plaintiff's annuity for one year, and then discontinued the payment, although he received subsequent consignments. The bill prayed that *D.* might be ordered to pay the annuity so long as he continued to receive the con-

The bill then stated that, in October, 1841, *John Francis Kirwan*, who had entered into possession of the plantations, was desirous of making an arrangement with some mercantile house in *London* for consigning to them the produce, such mercantile house undertaking to ship the supplies required from this country for the use of the plantations, to provide for the payment of a rent of 200*l.* per annum, to which an estate called "*Old Road*," in the possession of *John Francis Kirwan*, was subject,

signments:—*Held*, on demurrer, that, without deciding whether the Plaintiff could (with reference to the decision in the case of *Garrard v. Lord Lauderdale*) sustain a suit to enforce the agreement as against *D.*, *D.* could not, after the payment of the annuity which he had made under the contract, withhold from the Plaintiff the benefit of the contract for the further payment of the annuity.

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and also to provide for the payment of the said annuity to the Plaintiff: that the Plaintiff was empowered by *John Francis Kirwan* to enter into such arrangement and agreement, and that the Defendants, *Thomas Daniel* and *John Daniel*, carrying on business as merchants in *London* under the firm of *Thomas Daniel & Co.*, being desirous of becoming consignees of the produce of the plantations, and willing, in consideration thereof, to undertake to ship the necessary supplies for the same, and to provide for the payment of the rent of 200*l.*, and of the Plaintiff's annuity of 300*l.*, and also to honour the bills which might be drawn by *John Francis Kirwan* for the proper cultivation and management of the plantations, the following agreement was entered into between and by the Plaintiff, as such agent of the said *John Francis Kirwan*, duly authorised as aforesaid, "and also on his own behalf, in respect of his said annuity of 300*l.*, charged on the said plantations, comprised in the said indenture of March, 1841," and *N. & H. Mayo*, another firm, *West India* brokers, who claimed some lien on the plantations, and the Defendants, *Daniel & Co.*:—

"*London*, 29th of October, 1841:—It is agreed between *John Francis Kirwan*, Esq., of *Montserrat*, represented by his uncle, *Matthew Kirwan*, Esq., of *Brighton*, at present in *London*, and Messrs. *N. & H. Mayo*, and Messrs. *Thomas Daniel & Co.*, of *Mincing-lane*, *London*, that Messrs. *Daniel & Co.* shall honour the bills drawn by Mr. *J. F. Kirwan*, of *Montserrat*, for the proper cultivation and maintenance of the three estates, viz. *Farm*, *Waterwork*, and *Old Road*, in the said island; and also that they should ship such supplies as may be required from this country for the said properties; and pay Mr. *Matthew Kirwan* quarterly, commencing from the 1st of October now last past, 75*l.*, in discharge of his annuity of 300*l.* secured on the estates *Farm* and *Waterwork*, the

Daniel & Co., in repayment of such advances, and the same are fully liquidated, they *T. D. & Co.* taking, should there be a surplus in their hands at the said liquidation, to pay over the said surplus to *N. & H. Mayo*, in part-payment of interest and of a claim they have by assignment from *W* against the estates *Farm* and *Waterwork*; but *Mayo* are not precluded from hereafter taking steps for realizing their claim, should they have to be dissatisfied with the working of the scheme. Signed — *Matthew Kirwan, N. & H. Thomas Daniel & Co.*”

The bill stated, that, in pursuance of the said agreement, the Defendant, *John Francis Kirwan*, had and since the date thereof, consigned and still continues to consign to the Defendants, *Daniel & Co.*,—from time to time duly received,—the produce of the plantations: that the Defendants, *Daniel & Co.* paid to the Plaintiff the four quarterly payments which became due in respect of the said annuity of 30*l.* on the 1st of October, 1842; but that, since that date, they had not made any payment to the Plaintiff in respect of the annuity with the exception of three sums, making together 105*l.* but the Plaintiff had in June, 1845, received from *Francis Kirwan* a sum of 105*l.* in respect of the annuity: that a large sum of money was due to the Plaintiff in respect of such arrears, and the Defendants, *Daniel & Co.*, had refused to pay the arrears, or to provide for the future payment of the annuity to the Plaintiff.

The bill charged, that, according to the true intention of the agreement, *Daniel & Co.* were bound to pay the annuity to the Plaintiff so long as they should

value or amount of such consignments; but which, however, the bill alleged, were sufficient. The bill prayed an account of what was due to the Plaintiff for the arrears of the annuity, and that *Daniel & Co.* might be ordered to pay the same, and also to continue the payment of the annuity quarterly during such time as they should continue to receive the produce of the plantations.

Messrs. *Daniel & Co.* demurred for want of equity.

Argument.

Mr. *Rolt* and Mr. *Dickinson*, for the demurrer.—It is not competent to the Plaintiff to establish an interest in the agreement, by alleging that it was made by him, not only as the agent of *John Francis Kirwan*, but also on his own behalf. The terms of the agreement, and the parties entitled to the benefit of it, must be found on the agreement itself, and to that agreement it appears that the Plaintiff is no party, except in his character of agent. The Plaintiff has no interest in the agreement made between *John Francis Kirwan* and *Daniel & Co.*: *Garrard v. Lord Lauderdale* (a), *Wakwyn v. Coutts* (b), *Malcolm v. Scott* (c). The fact that the Plaintiff, being the agent in the transaction, had notice of the terms of the agreement, and might have expected or relied upon receiving the annuity, does not give him a right to sue upon the agreement: *Garrard v. Lord Lauderdale*, *Acton v. Woodgate* (d), *Scott v. Porcher* (e). In the case of *Fitzgerald v. Stewart* (f), the bill charged

(a) 3 Sim. 1.

(d) 2 Myl. & K. 492.

(b) 3 Sim. 14; *S. C.*, 3 Mer.

(e) 3 Mer. 652.

707.

(f) 3 Sim. 333; *S. C.*, 2

(c) 3 Hare, 39.

Russ. & Myl. 457.

that the defendants intended to apply the funds remitted to meet the plaintiff's demand, in satisfaction of their claims upon a party who had been a receiver of the estates, and with whom they had had large mercantile transactions. That case does not establish the proposition, that the mere payment of part of the claim of a creditor renders the party, who makes the payment, a trustee for the creditor of so much of the fund in his hand as shall be sufficient to satisfy the debt: *Browne v. Cavendish* (a).

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Mr. Romilly and Mr. Heathfield.—The bill states that the agreement was made by the Plaintiff, on his own behalf, as well as on behalf of the other party; and that statement must, for the purposes of the demurrer, be taken as true: it must be taken as a fact, added to the written contract. Taking the contract, simply as expressed in the written agreement, still, after the payment of the annuity by Messrs. *Daniel & Co.* for a considerable time in pursuance of the contract, they could not hold the consignments, and refuse to perform the other part of their agreement, by continuing to make the payment: *Fitzgerald v. Stewart*, *Burn v. Carvalho* (b), *Lilly v. Hays* (c), *Hutchinson v. Heyworth* (d), *Miln v. Walton* (e). They cited also *Wilding v. Richards* (f).

VICE-CHANCELLOR, after adverting to the opinion he had expressed on the case at the close of the argument—

Judgment.

The facts of this case are these:—*John Francis Kirwan* was the owner of some plantations in *Montserrat*,

- (a) 1 Jones & La. 606.
- (b) 4 Myl. & Cr. 600.
- (c) 5 Adol. & El. 548.

- (d) 9 Adol. & El. 375.
- (e) 2 Y. & C. C. C. 354.
- (f) 1 Col. 655.

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in the *West Indies*; he was the nephew of the Plaintiff, and the Plaintiff was his agent. The Plaintiff was entitled to an annuity of 300*l.* payable out of the plantations in question. *John Francis Kirwan* was desirous of making arrangements with some one in this country to send out supplies to the *West Indies*, for the due cultivation and management of the estates; and, according to the allegations of the bill, he authorised the Plaintiff to make such arrangements, and also to provide for payment of the Plaintiff's annuity of 300*l.* a year, as well as a rent of 200*l.* payable to another person. There is some question on the construction of the agreement, whether the annuity was to be payable by the consignees at all events, or whether it was only to be payable out of such consignments as they received; but as the bill states that they have received consignments sufficient to pay the annuity, or to pay it in part, it is for the present purpose immaterial which of these constructions shall be adopted. Now, the Plaintiff, according to the allegations in the bill, having had this commission, entered into an arrangement with the Defendants, Messrs. *Daniel & Co.*, in the month of October, 1841, which was as follows: [His Honor read the agreement, *supra*, p. 494.] The bill then alleges that Messrs. *Daniel & Co.* thereupon became the consignees; that they accepted bills; that the produce was consigned to them; that up to a certain time, which is stated, they regularly paid the annuity, and that they have since discontinued paying it, and the bill seeks a decree against Messrs. *Daniel & Co.*, that they continue to pay the annuity so long as they shall continue to receive the consignments. Messrs. *Daniel & Co.* have demurred to the bill, and they insist that the Plaintiff, being no party to, and having no ultimate interest under the agreement of October, 1841, has no right to sue them for his annuity, although, of course, *John Francis Kir-*

them to carry it into effect.

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I do not mean to go into the question of the effect of the agreement. It appeared to me that the Messrs. *Daniel* might probably have a right to say, that, although the Plaintiff appears to be the agent, yet, as the agreement is made with him as the agent for another person who is named as the party to the agreement, they did not by that arrangement,—merely by his being mentioned as the agent, give any right to the Plaintiff himself under the agreement. They might very well say, “We are quite content to be liable to those with whom we are dealing,—whose bills we accept, and from whom we receive the consignments, but we will not be liable to a third person.” I do not, therefore, give any opinion whether on the agreement alone the Plaintiff would have a right to sue. It was on that ground I was apprehensive that a decision on this demurrer might appear to conflict with the case of *Garrard v. Lord Lauderdale*, a case which, in one of its bearings, is of some difficulty.

So far as *Garrard v. Lord Lauderdale* follows *Walwyn v. Coutts*, as reported, but misreported in *Merivale*(a), I shall assume its authority to be unimpeachable; but the case of *Garrard v. Lord Lauderdale* went much further than *Walwyn v. Coutts*, for, in that case, the creditors were named as parties to the deed, of the third part; the trustees gave notice of the deed to the creditors (of whom the plaintiff was one), who were named as parties of the third part, and whose debts were to be paid, and the court held that the notice was immaterial. The case to that extent was, I believe, a case of the first impression; and the decision was certainly a surprise on

(a) Vol. 3, p. 707.

ment was, that the deed, *per se*, gave no interest to the creditors; and if that were admitted, then it was said a simple notice to the creditor of a deed which *per se* gave him no interest, could not enlarge the effect of the deed. That may be true, so far as the effect of the deed is concerned; but the argument omits the material consideration, that, although the notice may not alter the effect of the deed, it may alter the position of the creditor; and courts both of law and equity have repeatedly decided, that, where a creditor on whose behalf a stake has been deposited by the debtor with a third person, receives notice of that fact from the stakeholder, the notice will convert the stakeholder into an agent for, and a debtor to that creditor; and those cases have been decided on the ground that the creditor may, on the faith of the notice, have forborne to sue. The late cases at law which were cited at the bar are very strong, and in principle I cannot distinguish them from a trust in equity, as in *Garrard v. Lord Lauderdale*.

I should not, however, have presumed to make these remarks, were it not for the observation of the Master of the Rolls in *Acton v. Woodgate*,—the observations of the same learned Judge in an unreported case, of which I was furnished with a note by Mr. *Russell* many years ago; and the observation of Sir *Edward Sugden* on *Brown v. Cavendish*, as well as the difficulty always felt in applying the case of *Garrard v. Lord Lauderdale* in the particular alluded to. It appears to me, however, that I can decide this case without being in any danger of impeaching that authority. The case of *Fitzgerald v. Stewart* (a) has a material bearing upon the question, and I refer particularly to the Lord Chancellor's observations in that case (the same Judge who decided *Garrard v. Lord*

Lauderdale), that in the case of an annuity, the annuity is to be treated as an entire sum, and not merely as a succession of accruing payments; and that, where the annuity is paid by the trustee, that trustee thereby makes himself liable afterwards to the continued payment of the annuity, so long as he is placed in a position to make it. I do not by this decision in the least degree contravene *Garrard v. Lord Lauderdale*, but I do not (according to Lord *Brougham's* reasoning upon an annuity) extend it.

Demurrer overruled.

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LOWES v. LOWES.

1846.
2nd and 4th
June.

THE testator, *N. Lowes*, devised and bequeathed all his real and personal estate to his executors and trustees, and subject to his debts and funeral and testamentary expenses, and the expenses which the trustees should deem it expedient to incur in the management of the trust premises, or otherwise in the execution of the will,—he directed his trustees, by and out of the rents, issues, and profits thereof, to raise the yearly sum of 100*l.*, and pay the same quarterly to his wife, *Lucy Lowes*, or as she (not by way of anticipation) should appoint, so long as she should continue his widow; and subject as aforesaid, the testator directed that his trustees should stand and be possessed of the said trust premises, in trust to apply the whole or any part of the

The testator by his will devised and bequeathed all his real and personal estate to trustees, subject to debts, &c., upon trust by and out of the rents, issues, and profits thereof, to pay an annuity of 100*l.* to his wife during her life or widowhood, and subject thereto, upon trust for his daughter for life, with remainder to her children, remainder to his

brother. And the testator empowered his trustees, at their discretion, during the continuance of the trusts and notwithstanding the same, to continue and carry on all or any of the farms or other concerns in which he might be engaged at the time of his decease, and to restrict or increase any such concern, and to demise, mortgage, or sell all or any part of his real estate or chattels real:—*Held*, that the widow was not entitled both to the annuity given to her by the will and to her dower out of the real estate.

tenance or education or otherwise for the benefit of his daughter, *Mary Lowes*, until she should attain the age of twenty-one years, or be married, and that the unapplied income should be accumulated, and be liable to be applied in like manner, and, subject to such liability, be deemed accretions to the capital whence it arose. And when his said daughter should attain twenty-one, or be married, the testator directed his trustees to pay the rents, issues and profits of the trust premises to his said daughter, or as she should (not by anticipation, charge or assignment) appoint, for her life, for her separate use; and after the decease of his said daughter, in trust for her child or children who should live to attain the age of twenty-one years, or be previously married; and in default of such child or children, in trust for the testator's brother, *John Lowes*, his heirs, executors, &c., for ever. And the testator provided, that if his daughter should die under twenty-one without issue, in the lifetime of his wife, that the annuity of 100*l.* should be paid to his wife for her life for her separate use. And the testator thereby empowered his trustees, during the continuance of the trusts of the will, to continue and carry on all or any of the farms, or other concerns in which he might be engaged at the time of his decease, for such period, and in such manner in all respects as his said trustees should think proper, and especially with full power for his trustees to restrict or diminish, or to enlarge or increase any such concern, and to make any purchases whether of real or personal estate, and to enter into such contracts as they should deem expedient for the purposes aforesaid; and he thereby empowered his trustees, during the continuance of the said trusts, to demise or lease all or any part of the hereditaments for the time being vested in them upon the trusts afore-

of years not exceeding twenty-one years, in possession, and not in reversion, at the best yearly rent, without taking any fine or premium, and with or without a power for the lessee to surrender the premises, and under and subject to such other covenants as his trustees should think proper, but so that the respective lessees should covenant for payment of their respective rents, and execute counterparts of their leases as therein mentioned. And the testator thereby empowered his trustees, during the continuance of the said trusts, to sell, or mortgage and afterwards sell, all or any part of the trust premises which consisted of real estate or chattels real, whether subject to a lease or not, and at such time or times, and subject to such conditions as his trustees should think expedient. And the testator declared that the monies to arise by the exercise of the said powers, should be held upon the same trusts as were declared of the premises from whence they arose, but should be deemed personal estate; and he empowered the trustees to continue or vary the investments of his property existing at his decease.

The will was dated in October, 1838, and the testator died in 1841.

The Plaintiffs, who were the executors and trustees, filed their bill to have the trusts carried into execution under the direction of the Court; and prayed a declaration, whether *Lucy Lowes*, the widow, had elected or was bound to elect between the annuity given to her by the will and her right to dower.

The bill alleged that, after exhausting the personal estate in the payment of the debts and expenses, a large mortgage debt remained due, and that after satisfying the interest on that debt, about 170*l.* a year only

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remained applicable to the purposes of the will. The bill alleged that the widow had accepted one quarter's payment of the annuity. The widow, by her answer, submitted that she had not elected, and was not under the terms of the will bound to elect between the bequest and her dower. The daughter of the testator was an infant.

Argument.

Mr. Romilly and Mr. Toller, for the widow, contended that, in order to deprive the widow of her dower, or compel her to elect, it must unequivocally appear that the testator meant to devise the whole of the lands discharged from dower: that there must be a clear repugnancy. *Greatorex v. Cary* (a). If the gift and the claim of dower be not inconsistent, the widow is entitled to both; *Strahan v. Sutton* (b). It cannot be said that there was in this case any inconsistency in the enjoyment by the widow of both the legal right and the testamentary benefit, for the latter might, in the contemplation of the testator, have well been satisfied out of the personal estate. According to the later cases, it was clear that the charge of an annuity on the lands was not treated as evidence of intention to exclude dower; *Dowson v. Bell* (c), *Harrison v. Harrison* (d). Nor did any inconsistency arise out of the provision for the management of the farms, or the power of lease or sale. Those powers were capable of being exercised without disturbing the right of the widow, for it was not necessary that they should be exercised as to the entire estate. The testator plainly left the trustees to be governed by circumstances in their disposition of the estate; and the legal right of the widow might possibly have been one of the circumstances which he had in view. There were certainly

(a) 6 Ves. 616.

(b) 3 Ves. 249.

(c) 1 Keen, 761.

(d) *Id.* 765.

would exclude a legal right (a). The acceptance of a quarter's payment of the annuity could not be deemed an election by the widow, even if she were bound to elect; *Wake v. Wake* (b); *Reynard v. Spence* (c).

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Argument.

Mr. *Wood* and Mr. *Anstey* for the Plaintiffs, Mr. *Forster* for the infant daughter of the testator.—The gift of the annuity to the widow charged on the real and personal estate as a general fund,—the estate being insufficient, after paying the interest of the mortgage, to satisfy the annuity, and also preserve to the Plaintiff her dower,—the provision enabling the trustees to carry on and manage the farms,—and the power of sale and of mortgaging, are all inconsistent with any allotment of dower to the widow out of the same estates, by metes and bounds. That is the test by which the disposition must be tried in considering the claim of dower (d). Directions to trustees to carry on the business of a farm, *Butcher v. Kemp* (e), and to let and manage the estates, *Roadley v. Dixon* (f), have been expressly held sufficient to put the widow to her election. The same has been, in some cases, distinctly held to be the effect even of a gift to the widow of an annuity charged on the real estate, *Arnold v. Kempstead* (g), *Villa Real v. Lord Galway* (h); but here all these circumstances concur. It is not enough to say, that the powers of the trustees may be exercised in harmony with the assertion of the right of the widow. The question is, whether the trustees have powers under the will which, in their extent, are inconsistent

(a) *Birmingham v. Kirwan*, Russ. 202.
2 Sch. & Lef. 453.

(b) 1 Ves. jun. 335.

(c) 4 Beav. 103.

(d) 2 Sch. & Lef. 453 ; 3

(e) 5 Madd. 61.

(f) 3 Russ. 192.

(g) 2 Eden, 236.

(h) 1 Bro. C. C. 292, n.

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If, with reference to this question, we could stop at that part of the will at which the clause begins that enables the trustees to manage the farms, it does not appear to me, upon the authorities which have been produced, that the widow would have been put to her election. It is not necessary, however, that I should express any opinion upon the effect of the will, apart from the provisions with regard to carrying on the farms, and the powers of leasing and sale. The only question is, whether the power given by the will to the trustees to carry on the farms, or otherwise to deal with the property by way of demise, sale, or mortgage, can be treated as consistent with the preservation of the dower. If in this case I were to decide that the terms of the will do not put the widow to her election, my decision would not substantially be reconcilable with the cases of *Miall v. Brain* (d), or *Roadley v. Dixon* (e), or with the observations upon the case of *Villa Real v. Lord Galway*, which are made by Lord *Redesdale* in his judgment in *Birmingham v. Kirwan* (f). If any distinction were to be drawn between general and discretionary, and more specific powers of management, the law on this subject would be made more difficult in its application than it already is. I must declare that the widow is bound to elect.

(a) 4 Madd. 119.

(b) 1 Y. & C. C. C. 727.

(c) 1 Dr. & War. 94.

(d) 4 Madd. 119.

(e) 3 Russ. 192.

(f) 2 Sch. & Lef. 444.

THE will of *James Hannay*, dated in 1843, contained, after several bequests, the following:—"And to the two children of my late nephews, *James Martin* and *Andrew Douglas*, I bequeath 100*l.* each." *James Martin*, the nephew, left three children, and *Andrew Douglas*, the other nephew, left two children. The five children claimed 100*l.* apiece; but the residuary legatees contended that the bequest was void for uncertainty, or that only one sum of 100*l.* was given to the children of each of the nephews; or that, at all events, only 200*l.* was given among them.

Bequest of 100*l.* each to the two children of the testator's nephews, *A.* and *B.*; *A.* had three children, and *B.* two children:—*Held*, that the five children who were living at the date of the will and at the death of the testator were entitled, under the bequest, to 100*l.* a piece.

Mr. *Romilly*, for the plaintiffs, the executors.

Argument.

Mr. *Goldsmid*, for the three children of *James Martin*, and Mr. *M'Naghten*, for the two children of *Andrew Douglas*, cited *Garvey v. Hibbert* (a), *Tomkins v. Tomkins* (b), *Scott v. Fenoulhett* (c), *Stebbing v. Walkey* (d), *Harrison v. Harrison* (e), *Hare v. Cartridge* (f), *Lee v. Pain* (g).

Mr. *Heathfield*, and Mr. *Templeton Wood*, for the residuary legatees, submitted that, although it was clear the testator had mistaken the number of the children of his two nephews, yet it was equally clear that he had expressed distinctly the sums of money

(a) 19 Ves. 125.

(e) 1 Russ. & Myl. 72.

(b) Id. 126, n.; 3 Atk. 257.

(f) 13 Sim. 165.

(c) 1 Cox, 79.

(g) 4 Hare, 249.

(d) 2 Bro. C. C. 85.

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which he intended to give. It was merely a correction of manifest error in a testator to include the whole of the class which the testator designed to comprehend, when he had mistaken the number of which the class was composed; but it was going much farther, not only to add to the expressed number of the legatees, but also to increase the sum which the testator had given to the class; this was a construction only to be adopted, where, from other circumstances of the case, it was clear the amount of legacy had been inserted by mistake, and not in a case like the present, where there was no suggestion of any such mistake.

Judgment.

The VICE-CHANCELLOR held, that all the children of *James Martin* and *Andrew Douglas*, who were living at the date of the will and at the death of the testator, were entitled, under the bequest, to £100 apiece, and a declaration and decree for payment was made accordingly.

THE bill was filed by *T. Doyle* and *J. W. Scrivener*, on behalf of themselves, and all other the shareholders of a certain company provisionally registered, called "*The Southampton, Manchester, and Oxford Junction Railway Company*," (except such of the said shareholders as were named as Defendants thereto), against the provisional directors of the company, complaining of an arrangement, by which, as the bill alleged, the Defendants had departed from the objects of their undertaking, and had agreed to seek an act of Parliament conferring different and more limited powers than had been originally proposed, and also ultimately to effect an amalgamation with another company, called "*The Oxford, Southampton, Gosport, and Portsmouth Railway Company*;" or a sale of the North-Eastern part of the line to the latter company. The bill also complained, that the Defendants had, by improperly reserving shares for themselves and their friends, without paying the deposits thereon, and by applying the deposit money paid on

Bill against the directors of a railway company, provisionally registered but not incorporated, brought by *A.* and *B.* (alleging themselves to be holders of scrip of certain shares on which they had paid the deposits), on behalf of themselves and all other the shareholders of the company, except the defendants, stating that the objects of the undertaking had been improperly diverted by the defendants, and seeking to charge them with the amount of losses occasioned by their

alleged misconduct, and also to have the deposits returned, or the assets administered and the surplus divided. Plea, by one of the Defendants, that, before the bill was filed, the Plaintiff *B.* had sold and assigned to one *C.* the shares in the bill mentioned to have been allotted to *B.*, and that, at the time the bill was filed, all right, title, and interest in the said shares were vested in *C.*, and that *B.* had at such time no interest therein,—allowed, but owing to the generality of the averments in the plea, as to the transaction constituting, or assumed to constitute, the alleged sale and assignment, the costs were reserved.

Held, also, that the bill could not be sustained on the suggestion that *B.*, although he had parted with his interest in the shares, was still liable to third persons, and therefore entitled to call upon the directors to administer the assets of the company in discharge of its liabilities.

That the bill could not be maintained on the suggestion that *C.* was a party to the suit, as being one of the "other shareholders" for whose benefit it was brought, for such "other shareholders" must be not merely other persons, but persons owning other shares than those held, or claimed to be held, by the Plaintiffs named on the record.

That *B.* was not in such a case suing as a trustee for *C.*,—that he was not entitled to sue in that character,—and that parties allowed in such cases to represent absent shareholders must be parties having the beneficial interest in the shares in respect of which they seek relief.

sources of the company, and acquired unjust profits and advantages for themselves. The bill stated, that the Plaintiff *Doyle* became the allottee of twenty, and the Plaintiff *Scrivener* of ten shares, in the *Southampton, Manchester, and Oxford* Company; that they paid the deposit, and signed the subscribers' agreement and parliamentary contract, and obtained scrip certificates in respect of such shares in the following form:—

“No. 194. *Southampton, Manchester, and Oxford* Junction Railway. Capital, £900,000, in shares of £20 each; deposit £2 2s. per share. Scrip Certificate, 5 shares of £20 each, 971 to 975.—The holder of this Certificate having paid the deposit of £10 10s., and having signed the Parliamentary Contract and Subscribers' Agreement, will be entitled to five shares in the above undertaking, upon the Act of Parliament being obtained. (Signed) *B. Williams, J. M' Mellon*, Directors. *London*, October, 1845. Entered, *Edmund Read*, Secretary.”

The bill prayed, that the Defendants might be decreed to repay to the Plaintiffs the amount of the deposits which had been paid by them, with interest; or, if the Court should be of opinion that the deposits were liable to be applied in payment of any of the expenses of the undertaking, that an account of such expenses might be taken, and charged rateably on every share,—the Defendants being held to be liable in respect of all the shares allotted to them; and that the Defendants might be decreed to return to the Plaintiffs the residue of the deposits so paid by them; or that an account might be taken of the dealings and transactions of the Defendants in relation to the company, and the Defendants decreed to pay to the

company the deposits on all shares reserved or allotted to them, and charged with all losses occasioned by their neglect or misconduct; and that the assets might be applied in discharge of the liabilities of the company, and the surplus divided amongst the shareholders, including the Plaintiffs, in proportion to their respective shares and interests in the undertaking. The bill also prayed an injunction, and receiver.

To this bill one of the Defendants pleaded, that, before the filing of the bill, the ten shares in the company in the bill mentioned, allotted to the Plaintiff *J. W. Scrivener*, and each and every of them, and all the right, title, and interest of the said *J. W. Scrivener* in and to the same shares, and each and every of them, had been, and as the Defendant believed, for full and valuable consideration, paid to and received by the said *J. W. Scrivener*, well and effectually sold, assigned, and transferred by him to *H. Heald*, of &c., or to some other person, whose name and address were unknown to the Defendants, and by whom the same were afterwards in like manner sold, assigned, and transferred; and that, at the time when the bill was filed, the said ten shares, and each and every of them, and all the right, title, and interest in and to the same, and each and every of them, were and was, under and by virtue of such sale, assignment, and transfer, or sales, assignments, and transfers, well and effectually vested in the said *H. Heald*, as the purchaser thereof, for full and valuable consideration; and that the said *J. W. Scrivener* had not at the time when the said bill was filed, nor at any time since, nor had then, any right, title, or interest to or in the said ten shares, or any or either of them, or to or in the said company, or the affairs, concerns, or assets thereof, in respect of such shares, or any or either of them.

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*Statement.**Plea.*

Mr. Romilly, Mr. James Parker, and Mr. Bazalgette, for the plea.—If one of two co-plaintiffs has no interest in the subject of the suit, the bill cannot be sustained. The objection may be raised by demurrer: *Page v. Townsend* (a), *Cuff v. Platell* (b), *King of Spain v. Machado* (c); or by plea: *Makepeace v. Haythorne* (d); or it may be taken at the hearing of the cause: *Cowley v. Cowley* (e). On the question suggested in argument, whether the shares were legally saleable or transferable before complete registration, the cases of *Kempson v. Saunders* (f) and *Young v. Smith* (g) were cited.

Mr. Kenyon Parker and Mr. Hetherington, in support of the bill, argued, first, that the plea did not sufficiently state the facts upon which the conclusion as to the sale and assignment was founded; secondly, that, assuming the shares to have been assigned, still the liability of the Plaintiff for the debts of the company remained, and he was entitled to require the transactions to be wound up; thirdly, that the Plaintiff, if not entitled on his own behalf, was entitled on the behalf of *Heald*, to the relief he sought; and lastly, that the addition of the Plaintiff *Scrivener* to the record was no impediment or objection to a decree in favour of the other Plaintiff: *Davies v. Quarterman* (h).

July 14th. VICE-CHANCELLOR:—

Judgment. The Defendants are the provisional directors of a

(a) 5 Sim. 395.

(b) 4 Russ. 242.

(c) Id. 225.

(d) Id. 244.

(e) 9 Sim. 299.

(f) 4 Bing. 5.

(g) 4 Railw. Cas. 135.

(h) 4 You. & Col. 257.

Oxford Railway Company," and the bill prays, amongst other things, an account of the assets of the company, the application of such assets in discharge of their liabilities, and a division of the surplus among the shareholders, including the Plaintiffs, in proportion to their interests. For the purpose of this plea, it will be sufficient to say that the bill alleges that the Plaintiff *Scrivener*, in September, 1846, became the allottee of ten shares in the company,—that he paid the deposits upon those shares,—signed the subscribers' agreement and parliamentary contract, and obtained scrip; and in fact that he became and was a shareholder in the company during the several transactions which form the subject of complaint in the bill, and he claims in the bill to be still a holder of these ten shares. The Plaintiff *Doyle* is the holder of twenty of such shares. To this bill the Defendant *Williams* has put in a plea in bar. The question now before me is, whether this plea in bar is good or not? For the purpose of trying its sufficiency, I will assume that, at the time the bill was filed, the ten shares, and all right, title, and interest in and to them by virtue of the sale were well and effectually vested in *Heald*, for valuable consideration. Then two questions arise: first, did that fact, if well pleaded, deprive the Plaintiff of all right to discovery and relief?—that is, is the plea good in substance; and secondly, is it well pleaded? In considering the former question, I assume that the latter is to be answered in the affirmative.

The question, whether the plea is good in substance, must be determined by the same considerations which would apply if *Scrivener* were the sole Plaintiff. If *Doyle* were to die before the hearing, and his representative did not revive the suit, *Scrivener* would become

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Scrivener which the plea suggests, would in that state of circumstances disentitle him, as sole Plaintiff, from obtaining relief at the hearing, the circumstance that *Doyle* is a Co-plaintiff with him will not alter the case. The bill, if the truth of the case had appeared upon the face of it, would, according to the cases, have been demurrable: *King of Spain v. Machado* (a), *Makepeace v. Haythorne* (b), *Small v. Attwood* (c). There is no doubt that the ten shares were assignable as between *Scrivener* and *Heald*; and that they were also assignable as between those parties on the one side, and the company on the other, must, upon these pleadings, be assumed. There is nothing in the bill to exclude it, and nothing to make the assignment illegal in the abstract: *Young v. Smith* (d). Assuming, then, that the ten shares were assignable, and that they were well assigned to *Heald*,—what personal interest has *Scrivener* to enable him to sustain the suit? After the assignment, it was for *Heald* and not for *Scrivener* to determine whether the alleged arrangements between the *Southampton, Portsmouth, and Gosport Company*, and the *Southampton, Oxford, and Manchester Company*, were proper or justifiable; or whether the acts which the bill alleges to have been done by the provisional directors, without consulting the shareholders, should be adopted or rejected. And upon the same hypothesis, the manner in which the provisional directors have dealt with the shares and the assets of the company is a matter in which *Scrivener* could have no personal interest, at least so far as those acts of the provisional directors may have merely checked the prosperity of the concern.

(a) 4 Russ. 225.

(b) Id. 245.

(c) See 1 You. & Col. 39.

(d) 4 Railw. Cas. 135.

But, then, on behalf of the Plaintiffs it was said, that, although *Scrivener*, as a retired shareholder, had no direct interest in the prosperity of the concern, he had an interest in seeing that the assets were properly applied towards the discharge of the liabilities for which he had made himself personally answerable. This argument, if it were admitted, would strike out the whole prayer of the bill as it now stands, and would convert the bill into a bill for indemnity merely,—making *Scrivener* a suitor in a character entirely different from that in which he now appears upon the record. But does the bill state circumstances which shew that *Scrivener* is entitled to such an indemnity as this argument suggests, treating the prayer of the bill for the purpose of the argument as if it were adapted to that object? I have read the bill, and I cannot find that such a case is anywhere suggested. There is no suggestion of any deficiency of assets, which, as between *Scrivener* and the other shareholders, might render him liable to contribution. Nor is any case stated from which it is to be inferred that *Scrivener* has made himself personally liable for the demands of strangers against the company, if any such exist. But a conclusive answer to the existence of any such supposed liability appears in the fact of the assignment of *Scrivener's* shares to *Heald*, and the absence of any express contract between them which would entitle *Scrivener* to any such relief as I suppose him to have asked. A person who sells his interest in a concern cannot, without an express contract, insist upon a right to interfere in the affairs or conduct of the concern after such sale; and if such a contract existed it was incumbent upon *Scrivener* to shew it. The relief asked by this bill, unless warranted by some special contract, is in derogation of *Heald's* right. My conclusion, therefore, as far as relates to *Scrivener*, is, that, if *Scrivener* has sold his shares to *Heald*, the bill does not state a

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case which shews that he retains any personal interest in the concern entitling him to relief in this suit.

But it was said, that, inasmuch as *Scrivener* had signed the subscribers' agreement and the parliamentary contract, and nothing had been done to substitute *Heald* for him, *Scrivener* remained, or should be looked upon, as a trustee for *Heald*, and as representing *Heald* upon the record in that character. Without repeating that *Scrivener* is not here suing in the character of trustee, my opinion is, that *Scrivener* could not sustain this suit in the view of the case which this argument suggests.

It was then argued, that, this being a bill filed on behalf of the Plaintiffs, and all other the shareholders, *Heald*, in respect of his beneficial interest, is included in the general description of "other shareholders." There is an inaccuracy of language involved in this argument. "Other shareholders" must mean holders of shares other than those held by the Plaintiffs; and that observation is not one of mere form. The Court, in cases of this nature, permits a small number of shareholders to sue on behalf of themselves and others, assuming that the absent shareholders are adequately represented by parties having the same interest as themselves. That rule would not permit a mere trustee, who has no beneficial interest, to represent the absent shareholders, and thereby, in fact, enable him to represent his own cestui que trust, who is not before the Court. If *Heald* be a shareholder, I see no reason why he should not be in the suit, and why the real case should not be put upon the record.

It is further said that the objection resolves itself into an objection for want of parties, and that the plea, being

a plea in bar, would on that account fail. With that
 argument I do not agree. A plea of want of parties
 admits the title to relief, provided the proper parties
 are brought before the Court, but it is impossible to read
 this record as containing such an admission. Can the
 Court at the hearing of the cause permit the amendment
 of the bill by introducing *Heald* as a party, whilst the
 record asserts that *Scrivener* is the owner of the shares?
 If so, will *Heald* join with *Scrivener* as Plaintiff, and if
 not, and he should be made Defendant, will he adopt or
 reject the acts of *Scrivener* in the suit? These ques-
 tions appear to me most material in considering the
 case. It is not enough for the Plaintiff to shew that, by
 means of some alteration to be made in the bill, and
 of some possible course to be taken, the suit may be made
 available. It must be shewn that, according to the case
 made by the bill, the Plaintiff will necessarily be entitled
 to some relief, whatever course may be taken by *Heald*.
 The plea admits the allegations in the bill, but unless it
 follows that relief must be given according to such al-
 legations, notwithstanding the assignment of the shares,
 the plea will be good: *Kemp v. Pryor* (a).

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 Judgment.

The question as to the form of the plea is one of
 greater difficulty. I do not refer to that part of the
 plea relating to the assignment upon which, standing
 alone, there might be doubt, for that, I think, is
 made clear by what follows. It means that there
 has been a sale or assignment directly from *Scrivener*
 to some one else, who has assigned them to *Heald*, and
 there is a positive averment that at the time of filing
 the bill *Heald* was the owner of the shares. The
 difficulty I have felt, as to the form of the plea, and
 which has not been wholly removed, is this,—the

(a) 7 Ves. 245.

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statement of the transaction which the Defendant says amounts to a sale or assignment of the shares. It is possible,—although I admit it is scarcely probable,—that the Plaintiff may not know what the transaction was (if there were one) upon which the plea is founded. For this reason I have hesitated much as to the manner in which I should deal with the plea. By the course which I shall take the justice of the case will be met, and no rule of law will be violated. I allow the plea, giving the Plaintiff leave to amend, and reserving the costs of the plea until the hearing of the cause, or further order.

CAMPBELL v. THE LONDON & BRIGHTON
RAILWAY COMPANY.

29th July,
3rd, 5th, &
11th Nov.

AT a half-yearly meeting of the *London and Brighton* Railway Company, holden on the 20th of January, 1842, it was resolved, "That the directors be empowered to raise a sum not exceeding 300,000*l.* by an issue of loan-notes, under the seal of the company, payable at the end of 5 years, bearing interest in the meantime at the rate of 5*l.* per cent. per annum, with an option to the holders of such notes to convert them at the expiration of not more than three years into quarter shares of this company, at 10*l.* per quarter share, under the powers of an act to be obtained for that purpose, for

A railway company resolved to raise a sum of money upon loan-notes, payable at the end of five years, bearing interest at 5*l.* per cent. in the mean time, with an option to the holders to convert them, at the expiration of three years, into shares of the company, at a certain rate per share,

under the powers of an act of Parliament, to be applied for as early as possible; and the company advertised for tenders accordingly,—one half of the loan to be paid to the company when the tenders should be accepted (February, 1842), one quarter on or before the 15th of April, and the other quarter on or before the 15th of July following. The loan was made by various persons, to whom, on the payment of the last instalment (July, 1842), loan-notes were delivered, promising to pay the sums expressed therein on the 15th of February, 1847, with an indorsement thereon referring to the resolution, and intimating that in pursuance thereof application was intended to be made to Parliament for an act, under the terms of which the bearer would be entitled, on the 15th of February, 1845, provided previous notice was given, to convert the loan-notes into shares, at the price mentioned in the resolution. An act was afterwards obtained, enabling the company, for the purposes therein mentioned, to issue new shares of such amount, and to be appropriated and disposed of in such manner, for such prices, and by such ways and means, as by the order of a meeting of the company should be determined. By a meeting of the company, subsequently held, it was resolved, that the new shares authorized by the act should be raised and allotted to and amongst the holders of loan-notes, in the manner and upon the terms directed by the act.

Held, that the effect of the act, and the subsequent resolution of the company, was not to allot the new shares amongst all the loan-note holders unconditionally, but only as they had acquired a right to such allotment by virtue of their antecedent contract.

That the term of five years, at the end of which the notes were to be paid off, must be reckoned from February, 1842, when the first instalment of the loan was advanced; and that the three years, during which the holders were to have the option of converting the notes into shares, must be reckoned from the same time.

That, from the nature of the property which was the subject of the option, time was of the essence of the contract.

That the indorsement on the loan-notes did not enlarge the time of the option by continuing it until limited by an act of Parliament or otherwise;—but whether the company had power to restrict the option, by requiring notice *before* the 15th of February, 1845, (the end of the three years), or whether the loan-note holders accepting the notes with the indorsement expressing that restriction, without objection or protest, would be bound thereby—*quære*.

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which application will be made to Parliament at the earliest possible period,—the present shareholders to have the preference of tendering for such loan-notes, and such tenders to be made on or before the 11th day of February next, when the allotment will take place; one half of the amount tendered, to be then paid; one quarter of the amount tendered, to be paid on or before the 15th of April; the remaining quarter on or before the 15th of July next, and interest to commence from the time of the respective payments; it being distinctly understood, that the directors are never to call for the remaining 5*l*. on the shares of the company, provided the above sum of 300,000*l*. be raised by the means proposed.”

On the 21st of January, 1842, the solicitors of the company caused the following advertisement to be published in the newspapers:—“*London and Brighton Railway Company.*—Tenders for shares.—The directors of this company are prepared, pursuant to a resolution passed at a general and special meeting of their proprietors held at the *London Tavern*, the 20th day of January instant, empowering them to raise 300,000*l*. in loan-notes, under the seal of the company, payable at the end of five years, bearing interest in the meantime at 5*l*. per cent. per annum, payable half-yearly, with an option to the holders of such notes to convert them at the expiration of three years into quarter shares of the company, at 10*l*. per quarter, under the powers of an act to be obtained for that purpose, for which application will be made to Parliament at the earliest possible period, and in the allotment of which notes the proprietors are to have the preference, to receive tenders for loans. The tenders are to express the sums proposed to be lent, to be addressed to the board of directors at the company’s office, No. 10, *Angel Court, Throgmorton*

of February. One half the amount to be paid on the allotment. One quarter on the 15th day of April next, and the remainder on the 15th day of July next, and interest is to commence from the time of the respective payments. By order of the Board of Directors. (Signed) *Sweet, Sutton, Evens, and Ommanney.* London, 21st January, 1842."

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Tenders were received, and notes were issued for the money lent, to the amount of 300,000*l*. The Plaintiffs, among others, lent to the company several sums of money, and paid one half, according to the terms of the resolution, in February, 1842, one fourth on the 15th of April, 1842, and one other fourth on the 15th of July, 1842. On the payment of the last instalment the loan-notes were delivered to the Plaintiffs, for the sums which they had respectively lent to the company. The notes were in the following form:—" *London and Brighton Railway Company, £ .* On the 15th day of February, 1847, the *London and Brighton Railway Company* promise to pay the bearer hereof, at Messrs. *Smiths, Payne, and Smiths, Lombard Street, £* for value received, and that, till the said sum becomes payable, interest at the rate of 5*l*. per cent. per annum shall be paid half-yearly, at the respective dates of 15th August and 15th February. As witness their corporate seal. Sealed by order of the Board of Directors. —, Secretary." And a memorandum, indorsed upon the notes, was as follows:—"In pursuance of a resolution of the general meeting held at the *London Tavern, Bishopsgate Street, London*, on the 20th day of January, 1842, application is intended to be made to Parliament for an act, under the terms of which the bearer will be entitled, on the 15th day of February, 1845, provided previous notice be given, to

On the 31st of May, 1843, an act "to enable the *London and Brighton Railway Company* to raise a further sum of money, and for altering and amending the act relating to such railway," received the royal assent. It was thereby enacted (s. 2), that it should be lawful for the company, from time to time, "by an order of any general or special general meeting of the said company, to raise by contribution among themselves, or by the admission of other persons as subscribers to the said undertaking, or in part by each of those means, such sums of money as they shall from time to time think expedient, not exceeding in the whole the sum of 225,000*L.*, in addition to the monies authorised to be raised by the act" thereinbefore recited. And it was also enacted (s. 3), "that for the purpose aforesaid it should be lawful for the company to issue such and so many distinct and integral shares, of such amount, and to be appropriated and disposed of in such manner, for such prices, and by such ways and means, as by the order of any such meeting should be determined."

In pursuance of a public notice calling a meeting of the company, for the purpose (among others) of considering and determining as to the raising money, and the mode and manner of issuing shares in pursuance of the said act of Parliament, passed as aforesaid, in connexion with the resolution of the general meeting of the 20th of January, 1842, a special general meeting of the company was held on the 9th of January, 1845, at which it was resolved as follows:—"That the shares, authorised under and by virtue of the act of the 6 & 7 Vict. c. 27, be, and the same are hereby ordered to be, raised and allotted to and amongst the holders of loan-

such act, with liberty, however, to the holders of such loan-notes to accept integral shares of 50*l.* in lieu of quarter shares of 12*l.* 10*s.*, as originally proposed."

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Statement.

The company, soon afterwards, issued shares to the holders of the loan-notes, who, on or before the 15th of February, 1845, gave notice of their desire to become shareholders in respect thereof, after the rate of one share of 50*l.* for every sum of 40*l.*, for which the notes were holden. The Plaintiffs did not give such notice until some time, after the 15th of February, 1845, and before the end of June, 1845. On the 9th of January, 1845, the 50*l.* shares of the company were worth in the market 51*l.* 5*s.*, and on the 15th of February, 57*l.* 10*s.*, and the shares afterwards rose considerably in value. The Plaintiffs applied for shares, in lieu of their loan-notes, but the company refused to issue to them such shares.

The Plaintiffs then filed their bill against the company on behalf of themselves and all other the holders of loan-notes of the company "entitled to have shares in the joint-stock of the company issued to them in exchange for such loan-notes, and to whom such shares had not been issued," praying a specific performance by the Defendants of the agreement made by the company with the Plaintiffs, and the other holders of loan-notes, by entering in the books of the company as holders of shares in the joint-stock of the company, after the rate of one share of 50*l.* for every 40*l.*, or of one share of 12*l.* 10*s.* for every 10*l.*, for which the Plaintiffs and such other persons held loan-notes; and that the company might be ordered to deliver certificates of shares accordingly, upon the delivering up of the loan-notes. The bill also prayed an injunction

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Argument.

to restrain the company from issuing the other shares authorised by the said act to be created, except to the Plaintiffs and the other holders of loan-notes.

Mr. Bethell, Mr. Wood, and Mr. Goldsmid for the Plaintiffs.

The Plaintiffs have a statutory right to exchange their loan-notes for shares. The contract, upon which they lent their money, was, that the terms, upon which the exchange was to be made, should be defined by act of Parliament. An act of Parliament was passed, which enabled the company to create other shares by the admission of other persons as subscribers to the undertaking, but did not specify the conditions upon which the conversion of the loan-notes was to be effected, referring the manner of appropriation and disposition of the new shares to the determination of any general or special general meeting of the company. The meeting was accordingly held in January, 1845, and by that meeting it was resolved, that the new shares should be raised and allotted to and amongst the holders of the loan-notes. The appropriation was therefore absolute and unconditional. The resolution must be read as if incorporated in the act,—as an appointment is read, as if forming part of the instrument creating the power. The resolution indeed adds, that the allotment is to be “in the manner and upon the terms directed by the act,” but this addition is futile, for the manner and terms are by the act left to the meeting to determine. The conclusion, therefore, necessarily is, that the appropriation of the shares is directed to be made amongst all the holders of the loan-notes willing to accept them in exchange for their notes, until the time fixed for payment of those notes,

of the company would therefore be this—they were bound by their contract with the lenders of the money to pay them interest at 5*l.* per cent., and on the 15th of February, 1847, the principal, but the holders of the loan-notes had in the meantime, by their contract, and by the operation of the statute, an option to exchange their notes for shares in the company.

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Argument.

Treating the right of the holders of notes as founded upon the contract alone, and not affected by the statute, it is equally plain that the Plaintiffs are entitled to require the exchange. The contract must be found in the resolution, and advertisement of January, 1842. The time to be allowed for the conversion of the notes is, according to those documents, three years and no more. Upon that condition the money was lent. What is to be converted at the end of three years? The loan-notes. Three years from what time? From the time of the making and delivery of the loan-notes,—not from a time at which the loan-notes, the things to be converted, had no existence. The loan-notes were made and delivered to the holders on the 15th of July, 1842, and consequently the time for conversion was on or before the 15th of July, 1845, and before that time the Plaintiffs had demanded the exchange. Even supposing the words “at the expiration of three years” should be read three years from the time of the allotment of the loan, and payment of the first instalment in February, 1842, still there must be a reasonable time allowed after the expiration of the three years for the exercise of the option. The three years would expire at twelve o'clock at midnight. Does the company insist upon a construction so strict as this,—that the application for the exchange is to be ineffectual, if not made at the

Argument.

last instant or that time? Such a barefaced application of the language of the contract cannot be supported. The Court will consider what is a reasonable time to be allowed for giving effect to the option which the Plaintiffs purchased by their contract.

The only question then is, whether the company can be allowed to introduce into the case the indorsement on the loan-note, as a ground, either for depriving the Plaintiffs of the benefit of the statute, or for varying the contract upon which their money was lent? The indorsement cannot be said to be a part of the contract, for it was not seen by the lenders of the money until they had paid the last instalment. It is impossible, therefore, that the indorsement can in any respect vary the contract, or render it more strict as against the lenders, or abridge that option which they previously had. But the company may say, the indorsement is a notice in which the holders of the notes acquiesced. Of what, then, is it a notice? It is a notice that the company intended to apply for an act of Parliament containing certain provisions or powers. If those powers or provisions were derogatory to the right of the note-holders, the notice would be proper, as giving them an opportunity of appearing before Parliament to oppose the intended enactments. The notice was, that the act, to be applied for, would entitle the bearer of the note to convert it into quarter shares on the 15th of February, 1845, if previous notice were given. It did not intimate that, without previous notice, he would not be entitled to require the conversion, or that previous notice was absolutely essential. What reason had the holder to suppose that the right which he had already acquired to a three years' option, was not to be preserved to him? The most conclusive answer, however, is that the company did not apply for—or if they

and apply for, they did not obtain any such act as the notice intimated. At the utmost the notice only referred the note-holder to the act, and the act, when it was obtained, did not carry out any design, (if such design there were), to abridge the time of option. The act, as insisted in the first part of the argument, left the matter to a future general meeting, and the meeting directed the allotment to be absolute and unconditional. The indorsement, therefore, as an intimation of an intention which the company had no power to accomplish, was idle, and not being attempted to be acted upon, was and is wholly inoperative.

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Argument.

Sir Fitzroy Kelly, Mr. Romilly, and Mr. Adams, for the Company. Mr. Wray for the Chairman and Deputy Chairman of the Company, who were also made Defendants. The arguments for the Defendants will sufficiently appear in the grounds of the judgment.

VICE-CHANCELLOR:—

Nov. 11th.
Judgment.

The Plaintiffs and other persons on whose behalf the bill is filed are the holders of loan-notes of the *London and Brighton* Railway Company. The right of the Plaintiffs to be paid the amount due upon the notes of which they are holders is admitted, but the Plaintiffs claim to be entitled to have shares in the joint-stock of the company issued to them in exchange for the loan-notes, and this claim is resisted by the company. That the Plaintiffs would have been entitled so to convert their loan-notes into shares, up to and on the 15th of February, 1845, is admitted by the company; but the company contends that, in order to entitle them so to do, it was necessary that the Plaintiffs should have given notice of their intention on or before the 15th of

plea is in such general terms, that it affords no detailed statement of the transaction which the Defendant says amounts to a sale or assignment of the shares. It is possible,—although I admit it is scarcely probable,—that the Plaintiff may not know what the transaction was (if there were one) upon which the plea is founded. For this reason I have hesitated much as to the manner in which I should deal with the plea. By the course which I shall take the justice of the case will be met, and no rule of law will be violated. I allow the plea, giving the Plaintiff leave to amend, and reserving the costs of the plea until the hearing of the cause, or further order.

not notice of the resolution of the 9th of January, 1845, before the 15th of January, 1845. I notice this at the outset, because some observations were made at the bar to which this state of the pleadings would prevent me from giving effect if I felt the force of them.

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 Judgment.

At the close of the argument I stated my opinion upon two points in the case:—first, that if, by the contract between the company and the holders of the loan-notes, a time were fixed within which the holders of loan-notes intending to convert them into shares should give notice of such intention, such time would (from the nature of the property in question) be of the essence of the contract; and, secondly, that the allotment of shares to the holders of loan-notes by the resolution of the 9th of January, 1845, must be taken to have been an allotment in pursuance of the antecedent contract between the holders and the company, confirming by performance, but not altering (except by an option not affecting the question in the cause), the existing rights of the holders of loan-notes.

I proceed, therefore, to inquire what those rights were, and the answer to this inquiry must be formed on the effect to be given to the resolution of the 20th of January, 1842; the advertisement of the 21st of January, 1842; the loan-notes issued on the 15th of July, 1842; the statute 6 Vict. c. 27, passed on the 31st of May, 1843; the resolution of the 9th of January, 1845; and the acts of the parties under the same.

The question I shall first advert to is this:—Was any and what time fixed by the contract between the company and the loan-note holders, by or within which the loan-note holders, desiring to convert their loan-notes into shares, were bound to give notice of such desire?

[The Hon. stated the several documents and the facts mentioned above, so far as they were material.]

Now, taking the resolution of the 20th of January, 1842, and the advertisement together, (upon the credit of which the Plaintiffs say they advanced their money), my opinion is, that the five years mentioned in both these documents would expire at the end of five years from the date of the first instalment,—that is, on the 15th of February, 1847. It appears to me to be manifest, upon these documents alone, that the relation of debtor and creditor was to terminate at the expiration of five years from its commencement; and that, by the very terms of both the resolutions and advertisement, every creditor who paid an instalment on the 15th of February, 1847, became, when he had paid the remaining instalments, entitled to claim a loan-note, under the seal of the company, payable at the end of five years from the 15th of February, 1842. It is true, the loan in each case, though contracted for as from the 15th of February, 1842, was not complete until the third instalment was paid, on the 15th of July, 1842, but the relation of debtor and creditor commenced on the 15th of February preceding; and the repayment of the advance then made was not, as I read the resolution and advertisement, to be postponed beyond five years. And if I am right in saying the creditor was entitled to have that first advance repaid him at the expiration of five years from the time of its being made, the circumstance that the rest of the loan was payable by instalments can make no difference; for unquestionably the whole loan in such case was to be repaid at one time.

If, however, a doubt could exist upon this,—so far as the resolution and advertisement are regarded,—it

would be removed by the loan-notes themselves. On the 15th of July, 1842, the parties making the advance became entitled to and claimed the loan-notes; and the loan-notes were accordingly made and delivered to the parties entitled, payable on the 15th of February, 1847, with interest half-yearly, on the 15th of August and the 15th of February in each year. These notes have since been acted upon, and are as much the acts of the payees as of the makers; and as no objection is made to or respecting them, on the ground of mistake or otherwise, the 15th of February, 1847, is conclusively fixed, for the purposes of this suit, as the expiration of the five years mentioned in the resolution and advertisement of January, 1842, for payment of the loan-notes. Now, if the 15th of February, 1847, be the expiration of the five years mentioned in the resolution and advertisement of January, 1842, the 15th of February, 1845, must be the expiration of the three years mentioned in the same documents.

The next question is, whether it was necessary that the holders of loan-notes should, on or before the 15th of February, 1845, have given the notice insisted upon by the directors, and whether their omission so to do has precluded them from successfully claiming shares in the company in exchange for their loan-notes.

The resolution of the 20th of January, 1842, proposed to give an option to convert the loan-notes into shares, "at the expiration of not more than three years,"—that is, not after the 15th of February, 1845. But nothing is said in terms about notice. The resolution says only that the conversion is not to be after the 15th of February, 1845. The advertisement, referring in terms to the resolution of the preceding day, states the option to be exercisable "at the expiration

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the time specified in the resolution; and if the case depended wholly upon the resolution and advertisement, I confess I do not see what there is to preclude the company from contending, with effect, that the time for conversion was gone, at the latest, on the night of the 15th of February, 1845. Has, then, anything happened to alter this case?

The transaction next in order was the making and delivery of the loan-notes, which, so far as is expressed on their face, are not objected to. Now the indorsement on these notes, about which so much was said, does not alter the contract, as to the time for the conversion or otherwise, except that it may be said, that under the resolution and advertisement the conversion might have been made on the 15th of February, 1845, without any "previous notice;" whereas the indorsement requires notice on the 14th of February, at latest. And if the question in this cause had been, whether a claim, on the 15th of February, to have the notes exchanged for shares had been resisted upon the ground only that no notice was given before that day, I will not say what in my opinion the proper decision would have been. But no such question has arisen. On the contrary, the bill alleges, and the answer admits, that all persons who claimed on the 15th of February, 1845, had their claims allowed. The Plaintiffs, however, made no claim until June, 1845; and the case made by the bill is, that the Plaintiffs omitted to give notice because they were ignorant that any notice was required, and that, if they had been aware that notice was required, they would, to avoid dispute, have given notice. And the Plaintiffs, as a further excuse for not making their claim on or before the 15th of February, say, that the indorsement on the notes promised the

holders that an act of Parliament should be applied for, under the terms of which the holders of notes would be entitled to convert them into shares; and it is said, that, until such an act was obtained, the holders of notes were justified in supposing that they would not be deprived of their option to make the exchange.

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Judgment.

I cannot yield to these suggestions, nor to the arguments which have been founded upon them, as sufficient grounds for giving the Plaintiffs relief, to which in my judgment they would not otherwise be entitled. Omitting the suggestion respecting the act of Parliament, the case is simply this,—that the creditors of the company being (by that which the Plaintiffs say was their contract) entitled to an option to convert the loan-notes, which were to be given them, into shares, not later than the 15th of February, 1845,—pay their last instalment, upon which their right to the loan-notes becomes complete, in July, 1845, and accept the loan-notes, by which the makers, not altering the time for the conversion, state that one day's notice will be required. I will not now express any opinion whether, if the payees had objected to, or protested against the indorsement, so far as regards the notice, they could have maintained a claim to have notes given them without such indorsement. They did not,—(and it is obvious that the point was not worth contending for),—they did not object to or protest against the indorsement: they accepted the notes without objection, and have since treated them as valid instruments; and what they now ask me to decide,—and that upon a bill for specific performance,—is, that because that indorsement, in which they acquiesced, was put upon the notes, I am, as against the company, to vary the substance of the agreement between the parties, by holding that time is immaterial. If the Plaintiffs really considered the

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Judgment.

indorsement not binding, although not objected to at the time the notice was given, they ought at the latest to have made their claim under the resolution and advertisement of January, 1842; that is, not later than the 15th of February, 1845; and not to have waited until the following month of June, taking the chance of the rise or fall of the market. Indeed, the Plaintiffs' argument rather halts on this part of the case. For if the indorsement were present to their minds, the suggestion of the bill, that they were ignorant that notice was required, cannot be true; and if the indorsement was overlooked or forgotten, they have no excuse for not claiming on the 15th of February;—and so also, if, having the indorsement in mind, they intended to disregard it.

The company could only be understood as contracting to apply for an act of Parliament, having the effect suggested, but could not be understood as guaranteeing the lenders of the money that such an act should be obtained.

With respect to the act of Parliament,—I am not informed what precise application was made to Parliament,—but as the pleadings make no point upon this, as matter of fact, the Plaintiffs cannot well complain that the Defendants have said nothing on the subject. This however is clear, that, although the company might promise to apply for an act of Parliament to contain certain specified terms, no one could suppose the company intended to guarantee the loan-note holders that they could obtain such an act, or indeed any act. If the company applied for and obtained an act, empowering them to do all which the resolution of the 20th of January and the advertisements promised,—empowering them to give shares in exchange for loan-notes,—I cannot give credit to the Plaintiff's assertions as matter of fact, (not denying notice of the act or of the resolution of the 9th of January, 1845), that they or any note-holders were misled in the way suggested in argument.

I came to the resolution of the 9th of January, 1845, which is open to criticism. The act empowers the company to issue shares, "to be appropriated and disposed of, in such manner, for such prices, and by such ways and means, as by the order of any general or special general meeting of the company shall be provided." The act, therefore, sends us to the resolution of the company of the 9th of January, 1845, for the appropriation and disposition of the shares: and here the wording of the resolution is perhaps inaccurate, for, according to its literal construction, it appears to send us to the act of Parliament to ascertain the very thing, for the ascertainment of which the act appears to refer to the resolution. But the resolution is free from all ambiguity to this extent—that it allots the shares to the holders of the loan-notes, and does so allot them (in my judgment) according to the existing rights and interests of the holders. Such inaccuracy as is found in the resolution may be easily explained, and certainly causes no ambiguity.

The circumstance that the resolution of the 9th of January, 1845, was made under and in pursuance of the act of Parliament, appears to me (if it has any effect upon the case) to strengthen, rather than weaken, the reasoning I have applied to it. It cannot help the argument, that the company, by the resolution, gave the loan-note holders any greater or other interest in the allotted shares, than they were entitled to under their existing contracts. But it may be a question, whether these existing contracts are not in some degree made more stringent by the statute, and the resolution passed in pursuance of it.

Bill dismissed, with costs.

1847.

27th & 28th
January.

GREGSON v. BOOTH.

In a creditor's suit the Plaintiff did not establish his debt at the hearing; but the Court retained the bill, giving him liberty to bring an action. He produced other evidence and recovered in the action. Decree for payment of the debt, and costs in equity, but no costs given of the proceedings at law.

THIS was a creditor's suit. The evidence of the alleged debt was a writing proved to be in the handwriting of the testator, in a book belonging to the Plaintiff, his sister, in which he had stated himself to be a debtor to the Plaintiff in several items, amounting together to a sum of 226*l*. The suit was not instituted until fourteen years after the testator's death. The Defendant admitted assets, but did not admit the debt. The Court at the hearing retained the bill, with liberty to the Plaintiff to bring an action. The action was accordingly brought, and upon the trial the Plaintiff produced other evidence, consisting of letters of the testator, and recovered.

Argument.

Mr. Romilly and Mr. Nevinson now asked for the decree, for payment of the debt and costs, including the costs of the action at law.

Mr. Swanston and Mr. Faber, for the executors, and Mr. G. L. Russell and Mr. Grainger, for the other parties, opposed the claim for the costs of the proceedings at law, and of the hearing upon the equity reserved, and contended that the whole of such costs ought to be borne by the Plaintiff. If the additional evidence produced at the trial at law had been submitted to the Defendants, they would not have resisted the demand; and if the same evidence had been produced in equity, the expense of the trial at law, and of the second hear-

ing, would have been saved. They mentioned *Pearce v. Newlyn* (a).

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GREGGON
v.
BOOTH.

Judgment.

VICE-CHANCELLOR:—

The Plaintiff at the hearing of the cause did not prove such a case as would enable the Court to make a decree at the hearing of the cause. There was, therefore, one of two courses to be taken,—either to dismiss the bill, or to retain the suit, giving the Plaintiff liberty to bring an action. I directed the bill to be retained. The Plaintiff has succeeded at law by the production of evidence which was not tendered in this Court. It has been suggested at the bar, that the new evidence was subsequently discovered, but no attempt has been made to explain why the diligence which led to that discovery had not been exercised before the hearing in this Court. I think that, in the state of the case as it then stood, the executors could not have done otherwise than resist the claim. I shall make the decree for payment of the debt, with costs,—excluding the costs at law. I do not, however, think it necessary to direct the Plaintiff to pay the costs of the Defendants at law.

(a) 3 Madd. 185.

1847.

31st May,
& 1st June.

JACKSON v. MILFIELD.

After a decree in a creditor's suit for the sale of the real estate of the testator, and the application of the proceeds in payment of the debt, and after a sale under that decree, the devisees of the estate, being lunatic or out of the jurisdiction, are trustees of the estate, within the stat. 1 W. 4, c. 60, for the plaintiff in the cause: *Semble*.

If the devisees in such a case are not trustees for the Plaintiff, by the effect of the decree, the Court cannot make them such trustees by any declaration to that effect; and if the devisees are such trustees by the effect of the decree, an express declaration thereof (if necessary) should be made by decree, and cannot properly be made upon petition.

JACOB MILFIELD, the testator, devised his real estates in *Kingston-upon-Hull*, and in *Barton-upon-Humber*, unto his wife *Rebecca Milfield* for her life, in case she should so long remain unmarried, with remainder to his son *Lewis Milfield*, in fee, charged with the testator's debts, and with a limitation over, if *Lewis Milfield* the son should die under twenty-one. The testator died in April, 1837, leaving his widow and son surviving. In September, 1838, the suit was instituted by a creditor, for the payment of the debts of the testator in a due course of administration; and at the hearing of the cause in November, 1841, a decree *nisi* was made, and the decree was made absolute in April, 1842, whereby the usual accounts in a creditor's suit were directed. Pending the prosecution of this decree, *Rebecca* the widow became lunatic, though not found such by inquisition; and, being in contempt for not obeying an order to deposit deeds in court, was transferred to a lunatic asylum. The Plaintiff then filed a supplemental bill against the widow stating the lunacy, and a decree was made in the supplemental suit, directing the original decree to be prosecuted, as if the Defendant the widow had not become of unsound mind, and appointing a receiver of the testator's estate. By the Master's report made in January, 1844, and confirmed in July, 1844, the Master found the personal estate to be insufficient for the payment of the debts, and that the testator was seised in fee of the real estates at *Kingston-upon-Hull* and *Barton-upon-Humber* devised by his will. By the decree on further directions these estates were directed to be sold, and all proper parties were to join in the conveyance, and the

proceeds were ordered to be applied in payment of the testator's debts. The estates were accordingly sold under the decree, and the purchases of three lots were confirmed, and the purchase-money paid into Court. The purchase of the fourth lot, which comprised the residue of the estates, had not been confirmed.

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v.
MILFIELD.
Statement.

Lewis Milfield was an infant at the death of the testator. In 1841, he was convicted of felony, and was soon afterwards transported to *Van Diemen's Land*. He attained his age of twenty-one in 1845. No conveyance of the estates had been executed to the purchasers, by reason of the widow being lunatic, and the remainder-man being out of the jurisdiction.

The Plaintiff presented his petition intituled in the causes, and also in the matter of the statutes 1 Will. 4, c. 47, and 1 Will. 4, c. 60, praying that it might be declared in the causes, that *Rebecca Milfield* and *Lewis Milfield* were respectively trustees for the petitioner as the Plaintiff in these suits, for the purpose of carrying out the said sales, and that a proper person might be appointed to convey on behalf of *Rebecca Milfield* and *Lewis Milfield* to the respective purchasers, or as they might respectively direct the said three lots; and also the said lot 4 to the purchaser thereof, or as he might direct, in the event of the completion of his purchase.

Mr. *Goodeve*, for the petition, referred to the 3rd, 5th, 18th, and 20th sections of the statute 1 Will. 4, c. 60, (which were also set forth in the petition), and to the case of *King v. Leach* (a). He stated that application had been made to the Lord Chancellor for an order appointing some person to convey the estates, in the place

Argument.

(a) 2 Hare, 57.

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of the lunatic, but that his Lordship had considered the application to be premature, in the absence of a declaration that the lunatic was a trustee within the act.

VICE-CHANCELLOR:—

Judgment.

The object of this petition, which is presented by the Plaintiff in the cause, is simply to have it declared by the Court that the lunatic and remainder-man are trustees, and to obtain an order for a conveyance on behalf of the remainder-man; and I am told that the petition has been presented in consequence of an intimation from the Lord Chancellor that he could not direct a conveyance by the lunatic without such a declaration; and that the parties should make such application to me as they might be advised to make, in order to obtain the requisite declaration; and two questions appear to suggest themselves:—first, is the fact of the trusteeship sufficiently established by the decree? secondly, if not, is the present application the right mode of establishing it?

If the fact of the trusteeship be properly established there can be no doubt of the tenant for life and remainder-man being trustees within the act. In *King v. Leach* (a) the decree was made at the suit of an equitable mortgagee for sale and payment of his debt. And, the mortgagor being out of the jurisdiction, I held that the decree had established the mortgagor to be a trustee for the Plaintiff in the cause, and thereby brought the case within the act. That decision was thought right by conveyancers of experience; and I should not have doubted its correctness were it not that Mr. Goodeve's statement, as to what has passed before the Lord Chan-

(a) 2 Hare, 57.

cellor in the present case, leads me to suppose that the Lord Chancellor does not approve of it.

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 v.
 MILFIELD.
 —
Judgment.

The present case is this: the legal estate in the testator's real property is in his devisees. His creditors have a right in equity to have it sold for payment of their debts. A suit has been regularly instituted in this Court for the purpose of establishing that equity. And the Court by its decree of the 13th July, 1844, has established such equity, and given the Plaintiff a right to have the real estates of the testator sold and conveyed to the purchaser by the devisees claiming a beneficial interest in the estates adversely to the Plaintiff, and the proceeds applied for the Plaintiff's benefit. The decree does not in words declare a trust, but it establishes one.

If I am wrong in thinking that the decree upon the facts of the case, as they appeared, established the trusteeship, it is obvious that I cannot in this suit do more than I have done already. If the facts, with a decree properly worded, would bring the case within the act as to the fact of trusteeship, and the only difficulty is that the decree does not in terms contain a declaration of trust, (although I cannot think that such is the difficulty), I think the cause should be reheard *pro formâ*, and the requisite declaration inserted in the decree of the 13th of July, 1844. It cannot be right to make such a declaration on this petition. The 18th section of the act (upon which Mr. Goodeve tells me the difficulty arises) must require a suit regularly instituted for the purpose of having the trust declared, and a decree in that suit establishing it.

I think the safest and most respectful course for me to pursue will be to refuse the present application, and

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 v.
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 Judgment.

recommend the petitioner to bring the case, with these observations upon it, and the respectful intimation of my opinion, to the attention of the Lord Chancellor upon an appeal from this order. As the petitioner must go again to the Lord Chancellor, and there is no respondent, this course will not occasion any material expense.

The Lord Chancellor made the Order. See 2 Phill. 254.

1846.

13th, 14th,
 16th, 17th,
 18th & 25th
 November.

BLAIR v. BROMLEY.

WILLIAM BROMLEY and the Defendant *Joseph Warner Bromley* were in partnership together, as solicitors, from April, 1820, to September, 1834. For the first five years of the partnership the Defendant received a certain annual sum and half the profits made by the business of his own clients; and for the remainder of the partnership, his share was a third of the

Two solicitors having entered into partnership, each of them continued to attend to the business of his former clients, but on the partnership account; and one of the partners having proposed to invest a sum of money belonging to a client in a certain mortgage, the proposal was agreed to by the client, and the money was paid to the joint account of the partnership, at their bankers, for the purpose of the investment. The negotiations for the mortgage were broken off by the proposed mortgagor, but the partner by whom the proposal had been made to the client untruly represented to the client that the mortgage had been effected, and thenceforward continued to pay the interest as if it had actually been done. Although the banking account was kept in the name of the firm, the monies standing to the account belonged exclusively to the partner who committed the fraud; he alone attended to and had the control of the account, and the fraud was unknown to the other partner. Five years after the receipt of the money from the client the partnership was dissolved; and ten years after the dissolution of the partnership, the partner who had committed the fraud became bankrupt, and the client, who from the time of the dissolution until the bankruptcy had continued to employ him as his solicitor, discovered the fraud. The client then filed his bill against the other partner to recover the money.

Held, that the Defendant was originally liable to the Plaintiff for the money received by the firm; that his original liability was continued, as well after as before the dissolution of the partnership, by the fraudulent representations of his former partner; and that in equity the limitation in bar of the claim did not begin to run in favour of the Defendant until the time when the client discovered the fraud.

That the fraud and misrepresentation of one of the partners entitled the client to relief in equity against the other, not only if the case was one in which the client might have recovered in an action at law against such other partner, but also if the remedy at law against the other partner was barred by the lapse of time.

profits of the whole of the partnership business. Before the partnership commenced, *William Bromley* had been the solicitor of Mr. *Blair*, and during the partnership the firm was employed by Mr. *Blair* as his solicitors. In the transaction of their partnership business *William Bromley* and the Defendant attended to different portions, and the business of Mr. *Blair*, and especially that part of it which related to the investment of his money was conducted by *William Bromley*. Mr. *Blair* died in 1828, leaving considerable sums of money invested upon mortgage, which by his will he bequeathed to his wife for life, with remainder to his children. The Plaintiffs *William Thomas Blair*, and *Thomas Blair*, and the widow, were the executors and executrix appointed by the will, which was proved by the Plaintiffs alone. In 1829, a mortgage for 14,000*l.*, part of the testator's estate, was paid off, and the money paid into the Bank of England to the separate account of the Plaintiff *William Thomas Blair*. Some correspondence soon afterwards took place between *William Thomas Blair* and *William Bromley* on the subject of the new investment, which was required for monies belonging to the estate, and *William Bromley* proposed to *William Thomas Blair*, that a sum of 4500*l.* should be lent upon a mortgage in fee to a Mr. *Seabrooke*. *William Thomas Blair* acquiesced in the proposal, and forwarded from *Ilfracombe*, where he then resided, to *William Bromley* at the office of the partnership in *Gray's Inn*, a cheque on the Bank of England drawn in favour of Mr. *Seabrooke* for the sum of 4500*l.* This cheque was dated "London, 1st October, 1829," and was enclosed in a letter to *William Bromley*, which was dated "*Ilfracombe*, 29th September, 1829." The cheque was crossed by *William Thomas Blair* with the name of Messrs. *Rogers & Co.*, who were then the bankers of the partnership, and on the

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2nd of October, 1829, the cheque was paid into the bank of Messrs. *Rogers & Co.* to the credit of the joint account of *William Bromley* and the Defendant (a). An abstract of Mr. *Seabrooke's* title was laid before counsel, and a draft of the proposed mortgage deed was prepared; but the treaty for the mortgage proceeded no further. The fact that the proposed mortgage for 4500*l.* on Mr. *Seabrooke's* estate had not been effected, was not known to the Plaintiffs until the year 1844. During the whole of the intervening time, until the death of Mrs. *Blair*, the tenant for life, *William Bromley*, who, after the dissolution of the partnership, continued to be employed by the Plaintiffs as their solicitor, accounted with Mrs. *Blair* for the interest of the 4500*l.*, at 5*l.* per cent., as if it had been duly received by him from Mr. *Seabrooke*; and in a letter to *William Thomas Blair*, in April, 1830, purporting to contain a statement of the situation of the trust fund lent upon securities, there was the following particular:—"Mr. *Seabrooke*, 4500*l.*; 3rd October, 1829." In a subsequent statement the pretended mortgage was mentioned as follows:—"4500*l.* to *J. Seabrooke*, Esq., at 4½ per cent.; 12th September, 1829: this will shortly be paid back." Mrs. *Blair* died in November, 1841, and *William Bromley* thereupon advised that a suit should be instituted for the direction of the Court in the administration of the testator's estate, which was accordingly done.

A fiat in bankruptcy issued against *William Bromley*

(a) The counsel for the Defendant objected to the admission of the cheque in evidence, on the ground that, being drawn at *Ilfracombe*, more than fifteen miles from the Bank of England, it required to be stamped.

See 55 Geo. 3, c. 184, s. 13; 9 Geo. 4, c. 49, s. 15. The point was not decided, for the Court considered the evidence for the Plaintiffs to be sufficient without the cheque.

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in January, 1844, and it then became known to the Plaintiffs that the pretended mortgage on the estate of Mr. *Seabrooke* had no existence. In June, 1844, the bill was filed, praying that the Defendant *Joseph Warner Bromley* might be decreed to pay to the Plaintiffs the sum of 4500*l.* with interest at 5 per cent. by the year, and the costs of the suit;—the Plaintiffs offering to abide the directions of the Court touching* their proof under the bankruptcy.

The Defendant by his answer stated, that he had never been retained by the deceased Mr. *Blair*, nor by the Plaintiffs as their solicitor, and that the business of the deceased and of the Plaintiffs had been exclusively conducted by *William Bromley*. The Defendant denied that it was in his character of solicitor that *William Bromley* received the 4500*l.*, and he insisted that his partnership responsibility extended only to acts which were strictly professional. He submitted, that if he had incurred any liability owing to the partnership, such liability must have ceased at the dissolution in September, 1834, and he claimed the protection of the Statutes of Limitation.

It was not disputed that the Defendant was personally ignorant of the fraud which had been practised by *William Bromley*. It appeared in evidence, that on the 2nd of October, 1829, there was standing to the credit of the Plaintiff *William Thomas Blair*, in the Bank of England, the sum of 16,000*l.*, and that on that day 4500*l.* was drawn thereout, and paid to Messrs. *Rogers & Co.*, and that on the same day Messrs. *Rogers & Co.* received a sum of 4500*l.* from the Bank of England, which they carried to the credit of the partnership account. *William Bromley*, who was examined as a witness for the Defendant, deposed that the capital or

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27th & 29th
January.

GREGSON v. BOOTH.

In a creditor's suit the Plaintiff did not establish his debt at the hearing; but the Court retained the bill, giving him liberty to bring an action. He produced other evidence and recovered in the action. Decree for payment of the debt, and costs in equity, but no costs given of the proceedings at law.

THIS was a creditor's suit. The evidence of the alleged debt was a writing proved to be in the handwriting of the testator, in a book belonging to the Plaintiff, his sister, in which he had stated himself to be a debtor to the Plaintiff in several items, amounting together to a sum of 226*l*. The suit was not instituted until fourteen years after the testator's death. The Defendant admitted assets, but did not admit the debt. The Court at the hearing retained the bill, with liberty to the Plaintiff to bring an action. The action was accordingly brought, and upon the trial the Plaintiff produced other evidence, consisting of letters of the testator, and recovered.

Argument.

Mr. Romilly and Mr. Nevinson now asked for the decree, for payment of the debt and costs, including the costs of the action at law.

Mr. Swanston and Mr. Faber, for the executors, and Mr. G. L. Russell and Mr. Grainger, for the other parties, opposed the claim for the costs of the proceedings at law, and of the hearing upon the equity reserved, and contended that the whole of such costs ought to be borne by the Plaintiff. If the additional evidence produced at the trial at law had been submitted to the Defendants, they would not have resisted the demand; and if the same evidence had been produced in equity, the expense of the trial at law, and of the second hear-

ing, would have been saved. They mentioned *Pearce v. Newlyn (a)*.

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Judgment.

VICE-CHANCELLOR:—

The Plaintiff at the hearing of the cause did not prove such a case as would enable the Court to make a decree at the hearing of the cause. There was, therefore, one of two courses to be taken,—either to dismiss the bill, or to retain the suit, giving the Plaintiff liberty to bring an action. I directed the bill to be retained. The Plaintiff has succeeded at law by the production of evidence which was not tendered in this Court. It has been suggested at the bar, that the new evidence was subsequently discovered, but no attempt has been made to explain why the diligence which led to that discovery had not been exercised before the hearing in this Court. I think that, in the state of the case as it then stood, the executors could not have done otherwise than resist the claim. I shall make the decree for payment of the debt, with costs,—excluding the costs at law. I do not, however, think it necessary to direct the Plaintiff to pay the costs of the Defendants at law.

(a) 3 Madd. 185.

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Company v. Wymondsell (a), *Blain v. Agar* (b); but the Plaintiffs have not, in fact, a remedy at law, owing to the time which has elapsed since the original transaction, coupled with the dissolution of the partnership, the bankruptcy, and the other facts of the case. The cases of *Mackenzie v. Johnston* (c) and *Massey v. Banner* (d) were also cited with reference to the character of principal and agent, which it was submitted that the parties in this case had filled.

Mr. Romilly, Mr. Bacon, and Mr. Craig, for the Defendant.—The object of this suit is to recover a sum of money alleged to have been received from the Plaintiffs fifteen years before the bill was filed, and ten years after the dissolution of partnership, and, therefore, ten years after any acknowledgment of the debt made in the name of the Defendant. What is there in such a case to exclude the operation of the Statute of Limitations? It is said that the misapplication of the money by *William Bromley* was a fraud which obviates the effect of the statute. That is a proposition which is not supported by any, and is opposed, in principal, to several decided cases: *Howell v. Young* (e), *Short v. M^cCarthy* (f), *Brown v. Howard* (g), *Whitehead v. Howard* (h), *Bree v. Holbeck* (i). This is not a case in which the operation of the statute is excluded by the circumstance that the money sought to be recovered was obtained by fraud. The manner in which the Statute of Limitations is regarded by a court of equity is shewn in the case of *Hovenden v. Lord Annesley* (k). But admitting that *William Bromley* would still be

(a) 3 P. Wms. 143.

(b) 1 Sim. 37.

(c) 4 Madd. 373.

(d) Id. 413.

(e) 5 B. & C. 259.

(f) 3 B. & A. 626.

(g) 2 Brod. & Bing. 73.

(h) 2 Id. 372.

(i) Doug. 654.

(k) 2 Sch. & Lef. 629.

responsible, the Court will not deprive a Defendant, charged, not with any actual fraud, but charged constructively with the fraud of another person from which the Defendant has not derived any pecuniary advantage, of the benefit of the statute: *Beckford v. Wade*(a). The Plaintiffs are in truth chargeable with great laches: from one of the statements of *William Bromley*, they were expressly informed that "*Seabrooke's mortgage*" would shortly be paid off; but notwithstanding this they allowed many years to elapse without any inquiry or examination into the circumstances of the investment. The case is not one in which the Court will aid them against an innocent Defendant. It is a case in which the Plaintiffs have, not only in the original transaction, but throughout the subsequent circumstances, been content to rely, and in which they have, in fact, relied, not on the faith or the liability of the partnership, but on the faith and on the responsibility of *William Bromley* alone. There is no ground for the interposition of a court of equity; for the right, if any, cannot be placed higher than a legal right, and where the conscience of the Defendant is not affected, this Court will leave the parties to their remedy at law. The parties are equally meritorious in the view of this Court: the evidence is all available, as well at law, as in equity, and there is, therefore, not the circumstance which justified the interposition of the Court in *Pearce v. Creswick*(b). It has been attempted to make a ground for equitable jurisdiction, on the suggestion that the parties stood in the relation of principal and agent, but that fact is not enough to sustain a suit, unless there are accounts to be taken. The case is simply that of a party to whom a sum of money has been given to hand over to another, which renders the party receiving the money

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(a) 17 Ves. 97, per Sir *W. Grant*.

(b) 2 Hare, 286.

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liable to be sued at law, if he fails to perform the obligation which he accepted; but does not render him liable to be sued in equity: *Dinwiddie v. Bailey* (a), *Wilkinson v. Henderson* (b), *Foley v. Hill* (c), *Barker v. Dacie* (d), *Brooks v. Day* (e). On behalf of the Defendant it was also insisted that the Plaintiffs had not proved that the money sought to be recovered belonged to the estate of *Thomas Blair*, and, therefore, that they had not proved their title to sue jointly as executors, and if the money belonged to one Plaintiff only, there was a misjoinder (f).

Mr. *Bethell*, in reply.—The Plaintiffs do not sue one of the partners on the fraud, and the other on the contract. They sue for money which came to the hands of both partners, and which has been retained by the fraudulent representations of one of them. The act and statement of one partner is the act and statement of both; and if one partner is liable to be sued, the other partner cannot (owing to any state of things as between themselves) escape the same liability. It is not the Defendant's personal knowledge on which the title to relief is founded; it is on his constructive knowledge, on his duty to see and to know that the money of his employer was faithfully disposed of, and on his interest in the knowledge of the true facts, which, in law, forbids the supposition that he had not that knowledge. It is not an excuse for omitting his duty to his clients, that he did not discharge the duty he owed to himself. The remedy at law may be lost by the lapse of time, if the Plaintiffs are bound at law to

(a) 6 Ves. 136.

(b) 1 Myl. & K. 589; per
 Sir *John Leach*.

(c) 1 Phil. 399.

(d) 6 Ves. 687.

(e) 2 Dick, 572.

(f) See the cases on this
 point cited in *Doyle v. Muntz*,
supra, p. 512.

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sue the Defendant upon the contract ; but the question then is, how has the lapse of time been occasioned ? It has been occasioned by the continued misrepresentations in effect made as to the investment of the money, and upon which representations the Plaintiffs relied. In such a case, equity will not allow the right of the Plaintiffs to be defeated by any merely technical rule adopted in a court of law: *Pulteney v. Warren*(a), *Grant v. Grant*(b), *The East India Company v. Campion*(c). The true question is, whether *William Bromley*, if he were the Defendant, would be liable in this Court, for, if he would in that case be liable, the present Defendant must be liable also.

VICE-CHANCELLOR:—

Nov. 18th.
 —
Judgment.

The onus on the Plaintiffs in this cause is first to charge the Defendant with a liability for the money, which is the subject of the suit. The only evidence by which the Defendant is charged in the first instance (excluding the cheque) is by a correspondence that passed between *William Thomas Blair* and *William Bromley*, in which mention was made of investing part of the testator's estate, and the result of which correspondence was a proposal, on the part of *William Bromley*, acceded to by the Plaintiff, *William Thomas Blair*, for investing 4500*l.*, part of the testator's estate, on the mortgage to Mr. *Seabrooke*. It appears that the arrangements having been made for this investment, *William Thomas Blair* wrote to *William Bromley*, and asked him the name of the bankers to be written across the cheque for the 4500*l.*, which was to be remitted to

(a) 6 Ves. 72. (b) 3 Russ. 596. (c) 11 Bligh, N. S., 158.

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—
Judgment.

William Bromley for the purpose of completing that transaction. I omit the evidence of the cheque itself. It appears that, at this time, there was 16,000*l.* standing at the Bank of England in the name of *William Thomas Blair*, one of the two executors, and as this 16,000*l.* was standing in the name of *William Thomas Blair* alone, it was not *primâ facie* ear-marked or distinguished as the property of the testator. It appears that on a given day a sum of 4500*l.*, part of the 16,000*l.*, was drawn out, and *William Thomas Blair* was debited with the amount of that sum. The clerk at the Bank of England says, that from looking at the books he is enabled to say that the 4500*l.* so drawn out was paid to *Rogers & Co.*, who were the bankers of the Defendant's firm, and it appears that on the same day *Rogers & Co.* received a sum of 4500*l.*, which was carried by them to the credit of the firm of the *Bromleys*. A subsequent correspondence took place, in which *William Bromley*, in his own name, but in fact on behalf of the firm, stated that the 4500*l.* had been invested on *Seabrooke's* mortgage in the manner which had been previously arranged. Leaving out the cheque, that is all the evidence which the Plaintiffs have to charge the firm, and I think it is enough.

I confess it appears to me, as it has from the beginning, that it is impossible, on the facts I have stated, not to conclude, that the 4500*l.* credited to the firm, at *Rogers & Co.*, was the 4500*l.* derived from the Plaintiff *William Thomas Blair*. It might, perhaps, have been material for the Defendant, in some views of the case, to have contradicted that conclusion. He has examined *William Bromley* as a witness, and though he—the party who knew the whole of the transaction—is examined, no attempt is made to contradict by his evidence the inference to which the facts above stated

appear to me necessarily to lead. It appears to me, therefore, without saying to whom the 4500*l.* belongs, that I should charge the firm with the receipt of so much money from *William Thomas Blair*.

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 —
Judgment.

Now it was said, that, if this money was not proved to be part of the estate of the testator, that this bill would be erroneous in form; because the Plaintiff *Thomas Blair* has, in that case, no interest in the question. I need not decide that point. It appears to me to be immaterial, whether that is so or not, for the purpose of this suit; because although, where such an objection is taken *in limine*, the Court will not allow a party, who has no interest, to sue jointly with one who has,—and although the same principle might perhaps apply even at the hearing of the cause, if the Court saw injustice was likely to follow from the form of the suit,—yet, when the Court has to make a final decree at the hearing of the cause, the ground of the rule, that a party not interested shall not sue jointly with one who is, does not necessarily apply; and, if it were necessary so to decide, the Court, rather than allow the suit to fail on the ground of form in that respect, might well disregard the objection. But the truth is, independently of the two letters referred to, which fix the firm with the knowledge that this money was part of the estate, I apprehend it is enough to say, that the Plaintiff, *William Thomas Blair*, the party to whom the money would belong, if it were not part of the testator's estate, states in point of fact that it is not his own money, but that it is money belonging to the estate. Such a statement by him might be enough to maintain a suit to recover the money, which, when recovered, would belong to the estate. When two parties join in stating that each has an interest, it is not necessary for the purposes of the

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—
Judgment.

If several complainants allege by their bill that they are jointly, or in some joint character, entitled to the subject of the suit, and one or more of them would be so entitled if, in this respect, the others or other of them were not, (no issue being joined on the question of the title, if any, being joint,) it is not necessary for the Plaintiffs, as between themselves, to prove in the cause, as against the Defendant, that their right, if any, is a joint right.

decree that the Plaintiffs should go into evidence as between each other, no issue being joined, for the purpose of shewing they have jointly that interest, which would clearly belong to one of them, if the joint interest did not exist: *Ryan v. Anderson (a)*. I am clear, that, upon the former ground, there is no reason why the Court should not give relief in this suit. I think the firm are charged in the month of October, 1829, with the receipt of 4500*l*.

Then comes the question of discharge; and in explaining how the case appears to me to stand, I will suppose the bill to have been in this simple form,—alleging that the 4500*l*. was paid to the *Bromleys* for the purpose of being invested,—that *Seabrooke* had refused to complete the transaction, and that the money had ever since remained in the hands of the firm. In that view of the case, the firm being once charged would of course continue liable, until it was, in some manner, discharged of the money, or the money was, in some way, applied to the Plaintiff's use. It would then become material to inquire whether there had been any acknowledgment by the firm, which would prevent the application of the Statute of Limitations; because the money having been paid to the firm in October, 1829, unless in the simple case I have put the liability is kept alive, the demand would be barred by the operation of the statute. It is therefore material, with a view to avoid all difficulty, that I should inquire down to what time the acknowledgment was continued, and if upon looking at the documents in evidence I should conclude that the liability of the firm was acknowledged by the act of either of the partners, by the payment of interest, or by any writing down to the year 1839,

(a) 3 Madd. 174.

there will be no difficulty; for that will prevent the application of the statute, and will enable the Plaintiffs to obtain relief, subject only to the question, whether, in that simple case, no fraud being supposed, the proceedings ought not to have been at law instead of equity.

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—
Judgment.

In order to try whether I am right in that view of the case, I will suppose, first, the case of there being no dissolution of the partnership. No question at law would then arise. Next, suppose the case of a dissolution, but no specific employment of *William Bromley* by the executors of the testator after the dissolution. In that case, I apprehend, there would be no doubt of the continuing liability; for the mere fact that parties do not choose to continue in partnership would not discharge either of them of a liability contracted by their joint receipt at a preceding period; the application of the statute being prevented by the payment of interest, or other acknowledgment of the liability of the firm.

The next question is, whether the subsequent dealing between the executors of the testator and *William Bromley* alone can have the effect of discharging the Defendant. It appears to me it can have no such effect. It is true, that in the case of *Thompson v. Percival* (a) and other cases, the doctrine which was laid down in the case of *David v. Ellice* (b) has been altered, but that has been on the ground of a presumed contract to discharge one party by treating the other as debtor. There can be no such ground in the case of a single transaction, which has been continued simply by the payment of interest according to the

(a) 5 B. & Ad. 925.

(b) 5 B. & C. 196.

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—
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tenor of the original contract between the parties. In none of these cases, therefore, would there be a good discharge.

Then, the only question is, whether the relief is in equity or at law. Supposing it to be *prima facie* a case cognizable in a court of law, and not a case for equity, the Plaintiffs must get over that difficulty by shewing that the case is, on some ground, brought within the jurisdiction of this Court, as that which is here relied on,—namely, fraud or misrepresentation. Whether it be put on the general ground of fraud, or whether of fraud in a person standing in the situation of attorney or agent, makes no difference; the misrepresentation in both cases is the gist of the complaint.

I have not in this case, for a moment, entertained a doubt, that if the bill had been filed against *William Bromley*, he might have been charged in this Court; because, in that view of the case, I should impute to *William Bromley* that the misrepresentation he made at the beginning of the transaction had been continued by him, from time to time, down to the day the fraud was discovered; there would be both *suppressio veri* and *suggestio falsi*; and the case would fall within the common principle of the jurisdiction of the Court. But the case, as opened at the bar, and as I understand it on the pleadings, is,—not that *William Bromley*, when he first made the suggestion of investing this money on *Seabrooke's* mortgage, was not really negotiating for the mortgage with *Seabrooke*,—not that he had originally any fraudulent purpose or intention, but that the transaction in its inception was perfectly regular. It appears, that the firm went through the form of perfecting the mortgage; the abstract was delivered, and was laid before counsel, who advised upon it; the conveyance was pre-

pared, and it was not until after this that *Mr. Seabrooke* for some reason refused to complete the transaction. In that view of the case there was no fraud in the origin of the transaction; and the only ground for charging the firm originally was the actual receipt of the money, the consequence of which I have already suggested. In this state of things, it turns out that *William Bromley* did represent that the mortgage had been obtained, which in point of fact had not been obtained; and as I have said before, I must consider him as repeating that fraudulent representation down to the last moment.

We have then to deal with the case of an innocent party. If the jurisdiction of the Court is to be founded solely on the ground of fraud, the question is, whether this Defendant, who originally is charged simply by means of the receipt of the money, can by the fraudulent representation of *William Bromley* be made liable in this Court, supposing he would otherwise be liable only at law. I do not mean at this moment to give any opinion upon that. It may be quite a clear point when I come to consider the pleadings. I cannot, however, question the soundness of the decisions referred to on behalf of the Plaintiffs, in which it has been held, that the act of one partner, done in regard to the regular business of the firm, shall be binding on his co-partner, and that may very well apply in a case where one partner, in transacting such business, has made a fraudulent misrepresentation.

1848.
BLAIR
v.
BROMLEY.
—
Judgment.

VICE-CHANCELLOR :

Nov. 25th.

At the conclusion of the argument in this case I stated my opinion, to which I still adhere, that I must

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BROMLEY.
—
Judgment.

decide on the liability of the Defendant upon the assumption that the 4500*l.*, the subject of the suit, came into the hands of his firm without fraud, and that the firm was originally chargeable in respect only of the receipt of the money; and that the only question is, whether the fraudulent acts of the Defendant's partner are to be deemed the acts of the firm, regard being had to this,—that the Statute of Limitations is a bar to the claim against the Defendant personally, unless the acts of *William Bromley* are to be taken as the acts of the firm.

Now my opinion is, that the false representation, first made by *William Bromley*, that the mortgage intended to have been executed by *Seabrooke* was executed by him, whenever and by whatever means that representation was made, must be deemed and taken as the representation of the firm. The receipt of the money for the purpose of effecting the mortgage was undoubtedly the receipt of the firm. Upon the evidence in this case, and upon the principles of courts of justice, I must (whatever the fact may be) impute to the Defendant a knowledge of that receipt, and of the purpose for which the money was received. In this state of things it was the duty of each partner to see that the mortgage was executed, and unquestionably the information given to the mortgagees that the mortgage was executed, was a representation within the scope of the duty which they had undertaken. I cannot stop short of the conclusion, that if the firm had employed an agent to do the work for the firm, the representation in question, if made by that agent, would have been the representation of the firm, and I cannot view the case less favourably for the Plaintiffs, because the agent of the firm on this occasion was one of the members of the firm.

I do not pursue further the question which was argued at the bar, whether the fraudulent misrepresentation of *William Bromley* would affect the Defendant. The onus, in the first instance, was upon the Plaintiffs to prove the misrepresentation they alleged to have been made by the firm. Having proved that in the single case which I have mentioned, they have proved enough, until the Defendant shews that the fraud was discovered at a time which bars the right to relief. The discovery of the fraud is not shewn to have taken place until within a very short period before the bill was filed. Then there is the *suggestio falsi*, which is necessary to constitute the fraud in this case, and the loss of the money in consequence of that suggestion, unless it is recoverable against the Defendant.

In order that my decision in this case might be placed on as broad a basis as possible, I have endeavoured to inform myself how the case would stand at law, if the Plaintiffs had brought the action at law against the Defendant, founded only on the receipt of the money. It is admitted that the Statute of Limitations would have been an answer to the demand. I have endeavoured to inform myself whether there was any form of action by which the Plaintiffs' proceedings at law might have avoided the Statute of Limitations; and I believe I am correct when I say, there is no proceeding at law by which they could have avoided the effect of the statute;—no proceeding founded solely on any distinction arising out of the fraud. The consequence is that the Plaintiffs have lost their remedy at law; and they are remediless unless relief be given in this Court. The jurisdiction of this Court is assumed on the ground of the fraud, and the time will run only from the discovery of the fraud.

1846.
 BLAIR
 v.
 BROMLEY.
 Judgment.

1846.
 {
 BLAIR
 v.
 BROMLEY.
 —
Judgment.

I certainly feel that this is a case of great hardship on the Defendant, and I must add my belief, which I partake with the counsel for the Plaintiffs, that there is not the slightest ground for any moral charge against the Defendant. It is on the ground of his civil liability that I am bound to decree the payment of the money, with interest and costs.

Affirmed by the *Lord Chancellor*, in the sittings after Trinity Term, 1847.

12th, 15th,
 and 18th
 December.

WORLEY v. FRAMPTON.

A copyholder agreed to demise a tenement within the manor for sixty-three years on a building lease, and, as the custom did not

BY an agreement, dated the 23rd of November, 1832, *J. A. Frampton* agreed to grant to *Worley*, the Plaintiff's testator, a building lease of a copyhold tenement, held of the manor of *Hornsey*, for the term of sixty-three years, reserving a pepper-corn rent for the first year, and

allow a lease to be made for more than twenty-one years, the copyholder agreed to execute a lease for twenty-one years, with a covenant, for himself, his heirs and assigns, to renew the lease for a further term of twenty-one years at the expiration of the first, and for a further term of twenty-one years at the expiration of the second term. The copyholder died before the lease was executed, having devised the premises to a trustee:—*Held*, on a bill by the lessee against the trustee for specific performance, that the trustee, having no beneficial interest in the estate, was not bound in the lease for twenty-one years to enter into any covenant for the renewal of the lease at the expiration of that term, and that he could only be required to covenant against his own acts.

Whether, if the trustee had brought his bill for specific performance against the lessee, the lessee would have been compelled to perform the contract if the trustee had declined to covenant for renewal—*quære?*

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annual rent of 10*l*. for the remainder of the term; and as the custom of the manor did not permit a lease to be made for a longer term than twenty-one years, it was agreed that *J. A. Frampton*, his heirs and assigns, should execute to *W. Worley*, his executors, administrators, and assigns, a lease of the premises for twenty-one years, from the 24th of June, 1831, reserving the said rent; and it was provided that the lessee should, among other things, thereby covenant to build a dwelling-house, of the value of 500*l*., upon the premises, within twelve months, and not to permit any other building to be erected upon the demised land, which might be a nuisance to the adjoining premises; and that the lessor should covenant for himself, his heirs and assigns, for the quiet enjoyment of the premises by the lessee, his executors, administrators, and assigns, during the term, and also for the renewal of the said lease for the further term of twenty-one years, and for the further renewal of such lease for the further term of twenty-one years at the expiration of the said renewed term, so that the lessee, his executors, administrators, and assigns, might enjoy the premises for the term of sixty-three years.

J. A. Frampton, the intended lessor, died before the execution of the lease, having devised the tenement to the Defendant, *W. H. Frampton*. *W. Worley*, the lessee, also died, having bequeathed to the Plaintiff his interest in the premises comprised in the contract. The dwelling-house was built in pursuance of the agreement.

The sole question in the cause arose upon the form of the lease. The Defendant, as trustee of the legal estate under the will of *J. A. Frampton*, insisted that he was

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not bound to do more than covenant that he had done no act to incumber the premises; and he declined to enter into a covenant for the future renewals at the expiration of the first or second term of twenty-one years. The Plaintiffs insisted that they were entitled to the same covenants from the Defendant, the devisee of the legal estate, as they would have been entitled to from the devisor under the contract; and they filed their bill for specific performance. The Master, to whom it was referred to approve of a lease, according to the terms of the agreement, settled the draft of a lease to be executed by the Defendant, containing a covenant, in the following form:—

“ And the said *W. H. Frampton*, in pursuance of the said stipulation in the said recited articles of agreement contained for the insertion in the lease to be granted in pursuance thereof, of such covenant for renewals as therein mentioned, and for the purpose of effectually binding at law the reversion of the said premises, with the performance and observance of such covenant for renewal, but not so as to bind the said *W. H. Frampton*, or his representatives personally, except in the event of his or their hereafter acquiring a beneficial interest, and then only to the extent of such beneficial interest in the said premises, doth, for himself, his heirs and assigns, covenant, promise, and agree with and to the said *Thomas Fernae*, his executors, administrators, and assigns, that he, the said *W. H. Frampton*, his heirs or assigns, shall and will, at the expiration of the said term of twenty-one years hereby granted, at his or their own expense (a), procure from the lord of the manor the necessary license to demise the said premises for the

(a) This was a term of the agreement.

further term of twenty-one years, and shall and will, in pursuance of such license, at the joint expense (a) of the said *W. H. Frampton*, his heirs or assigns, and of the said *Thomas Fernee*, his executors, administrators, and assigns, accordingly grant a renewed lease of the said premises unto the said *Thomas Fernee*, his executors, administrators, and assigns, for the further term of twenty-one years, to commence from the expiration of the said term hereby granted, at the like yearly rent of 10*l*, and under and subject to the like covenants and agreements on the lessee's part to those on his part herein contained, with a like covenant by the said *W. H. Frampton*, his heirs or assigns, for obtaining, at his or their expense, at the expiration of the said further term of twenty-one years, a further license from the lord of the manor to demise the said premises for a further term of twenty-one years, and also for granting at such joint expense aforesaid a second renewed lease of the said premises for the said further term of twenty-one years, at the like yearly rent, and under and subject to the like covenants to the rent and covenants respectively herein reserved and contained, except the said covenant for renewal, in order that, by means of these presents and the said two renewed leases respectively, the said *Thomas Fernee*, his executors, administrators, and assigns, may have and enjoy the said premises for the said term of sixty-three years, according to the said recited articles. Provided always, and it is hereby agreed and declared, that the said last-mentioned covenant by the said *W. H. Frampton* is meant and intended only to bind the reversion of the said premises hereby devised, and the said *W. H. Frampton*, his heirs and assigns, in respect thereof, and that he or they shall be liable to an action of damages

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(a) This was a term of the agreement.

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for breach of the said covenant as owner or owners of his said reversion, but not further or otherwise."

The Defendant excepted to the report.

Argument. Mr. *Humphrey* and Mr. *Faber*, in support of the exception:—

The Defendant is merely a trustee of the legal estate without any beneficial interest, and the only covenant which can be required from him is that he has himself done no act to incumber the property. In the case of *Page v. Broom (a)*, and in all other cases in which the parties, having the legal estate, have been required to do more than covenant against their own acts, the reason was that, in addition to their characters as trustees, they had some beneficial interest, and their covenants (beyond the common trustees' covenants) have been limited to that beneficial interest. 4 Cru. Dig., tit. 32, chap. 25, sect. 82 *et seq.*, ed. 1824; 2 Sug. V. & P. p. 453 *et seq.*, ed. 10th. The covenant is not, in fact, necessary to the Plaintiff's title. The devisees of the lessor would not be advised or permitted to sell the lessor's interest in the estate without notice of the agreement; and, indeed, notice of the tenancy would constructively affect a purchaser with notice of the rights of the tenant under the agreement. The purchaser in such a case must be content with his legal right during the term of the demise, and his equitable right to a renewal on its expiration. A right to bring covenant against the trustee would not give the lessee a better estate in the land.

Mr. *Romilly* and Mr. *Nevinson* for the plaintiff:—

The right of renewal arises out of the agreement, and

(a) 3 Beav. 36.

it is admitted to be a right which runs with the land; why then should it not be protected by a covenant running also with the land? *Furnival v. Crew* (a); *Barclay v. Raine* (b). It is a right which the Plaintiffs may insist upon in equity, against the Defendant, if the Defendant should be entitled to the legal estate in the reversion, at the expiration of the first demise: *Rawstorne v. Bentley* (c). There is no reason why the Defendant, who is now in the place of the original lessor, should not enter into covenants to do all he may hereafter be compelled in equity to do, and the covenant settled by the Master goes no farther. If the Defendant had come into the court for specific performance of the agreement, it would have been decreed only upon the terms of his entering into the covenants stipulated, and the plaintiffs are entitled to the same equity: *Powell v. Lloyd* (d). The devisee is within the description of "heirs and assigns" in the agreement: *Roe v. Hayley* (e).

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VICE CHANCELLOR:—

It has been argued that the effect of the covenant, approved of by the Master, if entered into, would be to bind the land, and give the party the best legal interest he can now have in the property. But the Defendant objects to enter into such a covenant, and the only question is whether I can compel a mere trustee to enter into any but the usual covenants in respect of his own acts. It is admitted that the Plaintiff would have had a good equitable title without this covenant, but the Plaintiff says that that is not sufficient.

Dec. 18th.
—
Judgment.

(a) 3 Atk. 83, 88.

(d) 2 Y. & Jer. 372.

(b) 1 Sim. & St. 449.

(e) 12 East, 464.

(c) 4 Bro. C. C. 415.

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—
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I must be distinctly understood as not giving any opinion how I should have dealt with the case if the Defendant, having declined to enter into the covenant, the Plaintiff had on that ground desired to be discharged from the contract rather than dispense with the covenant,—that is, how I should have dealt with the case if Mr. *Frampton* had been the Plaintiff, declining to enter into the proposed covenant, and *Worley*, as Defendant, had asked to be discharged unless the covenant were entered into. That is not the case. *Worley* does not seek to be discharged: he says that he will take the lease with the equitable title only, if he shall not be entitled to the covenant; and the question is, whether I can compel a bare trustee to enter into it. Why the trustee should have declined entering into this covenant is not a question into which I am at liberty to enter. It certainly appears to be as harmless a covenant as can be, for, beyond all dispute, the covenant would bind the land and not hurt the trustee. But, according to the established practice, I think I cannot compel the trustee to do more than enter into the usual covenant, that he has done no act to incumber the property. The case of *Page v. Broom* (a) is clearly distinguishable from this case, as are also the other cases which were referred to. It is, I think, to be regretted that the Plaintiff should not have the benefit of the covenant. I almost hope it will be given as a matter of favour; but I think I cannot compel the trustee to execute it. The exception, therefore, must be allowed, the deposit ordered to be returned, and the case referred back to the Master.

(a) 3 Beav. 36.

BULL v. PRITCHARD.

1846.

1st & 2nd
December.

1847.

11th, 12th, &
15th January.

THOMAS EVANS, by his will dated in 1809, after devising his freehold estates to trustees, upon trust to pay the rents and profits to his daughter, *Mary Bull*, during her life, for her separate use, proceeded—"And from and after the decease of my said daughter, I do hereby direct, limit, and appoint that my trustees or the survivor, &c., do, by good and sufficient conveyances and assurances in the law, convey and assure my said freehold estates unto and equally between and among all and every the child and children of my said daughter, *Mary Bull*, who shall live to attain the age of twenty-three years, and to his, her, and their heirs and assigns for ever, as tenants in common and not as joint tenants; and if there shall be but one such child, then to such only child, his or her heirs or assigns for ever; but in case there shall be no such child or children, or, being such, all of them shall die under the age of twenty-three years without lawful issue, then upon trust that my said trustees, or the survivors or survivor of them, or the heirs or assigns of such survivor, do, by such like good and sufficient conveyances and assurances in the law, convey and assure my said freehold estates unto and equally between and amongst all and every my brother and sisters, namely, *John Evans*, *Mary Spendlove*, *Elizabeth*, the wife of *John William Nevett*, and *Martha*, the wife of the said *John Millsom*, and to his, her and their respective heirs and assigns for ever, as tenants in common."

In a devise of real estate upon trust for the daughter of the testator for her life, and from and after her decease to convey such estate unto and equally between and among all and every the child and children of the daughter, who should live to attain the age of twenty-three years, and to his, her, and their heirs and assigns for ever; and in case there should be no such child or children, or, being such, all of them should die under twenty-three without issue, then over, with power to apply for maintenance; the interest of such child's share, notwithstanding such child's share should not be then absolutely vested,—the limitation to the children of the daughter and the limitations over on default of such children, are void for remoteness.

The testator then directed that a leasehold estate in *Southwark* should be held by his brother at a certain rent, and he gave all the residue of his estate and effects

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to the same trustees, whom he appointed his executors, upon trusts (a) similar to those declared of his freehold estates. And the testator gave his trustees and executors power to apply the interest of each child's respective share, or so much thereof as they might deem necessary, towards their maintenance, education, and bringing up, notwithstanding such child's share should not be then absolutely vested.

The testator died in 1817. *Mary Bull*, the daughter and only child of the testator, had at that time one child, *Mary*, the grand-daughter, who afterwards died intestate and without issue, leaving her uncle, the father of the Plaintiff, her heir-at-law, and which uncle afterwards died intestate.

After the death of *Mary* the grand-daughter, a bill was filed by *Mary Bull*, the daughter of the testator, and her husband, against the surviving executor and trustee, and against the surviving brothers and sisters of the testator, and the representatives of those who were dead, praying a declaration that the limitations and trusts created by the will concerning the freeholds, leaseholds, and residuary personal estate of the testator were void for remoteness. Upon the hearing of that suit in 1826, a declaration was made that the limitations over of the leaseholds after the death of *Mary Bull*, the daughter, were void; but the Court refused to decide in her lifetime on the rights of the parties in the freehold estate (b).

Mary Bull, the daughter, survived her husband, and died in 1838, without having had any other issue than

(a) See 1 Russ. 214, where this part of the will is stated. (b) See *Bull v. Pritchard*, 1 Russ. 213.

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the said *Mary* the grand-daughter, and having executed a will whereby she devised "her moiety, or equal half part, and all her share and proportion, right and interest of, in, and to a messuage or tenement, dwelling-house and premises, situate in *Three Crown Court, Southwark*, with the appurtenances," to the Plaintiff in fee; and she devised and bequeathed the residue of her estate, both real and personal, to trustees upon trust for the younger brothers and sisters of the Plaintiff. Part of the freehold estate of the testator was situated in the *Borough Market, Southwark*, and had formerly been occupied with a house in *Three Crown Court*, but was not actually situated in the latter place: this was believed to be the property which *Mary Bull*, the daughter, had intended by her will specifically to devise to the Plaintiff.

The Plaintiff by his bill stated that he was advised, and submitted to the Court that *Mary Bull*, the daughter, had only a life-interest in the freehold estates of the testator, and that subject thereto, the same, by virtue of the will, vested in *Mary*, the grand-daughter in fee; and that the Plaintiff was now entitled to the same in fee, as heir-at-law of his father, who was the heir-at-law of *Mary*, the grand-daughter. But if the Court should be of opinion that *Mary Bull*, the daughter, had become entitled, in fee, to the freehold estate, then the Plaintiff was entitled, under her will, to the premises thereby devised and described as situated in *Three Crown Court*; and it prayed that the property might be conveyed, and the rents and profits, accrued since the death of the testatrix, paid to the Plaintiff accordingly.

The Defendants were—the heir-at-law of the last trustee under the testator's will, and the trustees and the other cestuis que trust under the will of *Mary Bull*, the daughter.

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On the opening of the cause, it being intimated by the Counsel for the Plaintiff that they intended to argue in support of the validity of the gift to the child or children of *Mary Bull*, notwithstanding the decision of Lord *Gifford*, M. R., that such limitation as to the leasehold was void for remoteness, the *Vice-Chancellor* suggested that the Plaintiff should apply to the *Lord Chancellor* for liberty to set down the cause before him. The application was accordingly made, but his Lordship said that as the judgment of the *Master of the Rolls*, as to the personal estate, could not be pleaded in the suit, and it was merely an authority, the cause should take its course.

Argument. Mr. *Romilly* and Mr. *Heathfield*, for the Plaintiff:—

Mary, the grand-daughter, took a vested remainder in fee, with an executory devise over in case of her death under twenty-three. *Bland v. Williams* (a), in which Sir *John Leach*, M. R., proceeds on the assumption that the decision of Lord *Gifford*, on the question as to the leaseholds in this case, was not an authority: *Doe d. Dolley v. Ward* (b). But another answer to the argument to be founded on that case, and also on several other cases, is, that decisions on the construction of limitations of personal estate are not applicable to cases of real estate: *Doe d. Hunt v. Moore* (c), *Phipps v. Ackers* (d), *Greene v. Potter* (e).

Mr. *Sidebottom*, for the devisees of the residuary estate under the will of *Mary Bull*, the daughter:—

The words of the gift in this case affect both the time

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|------------------------------|------------------------------------|
| (a) 3 Myl. & K. 411. | & Grang. 1107; 3 Cl. & Fin. |
| (b) 9 Ad. & El. 582. | 703; 5 Sim. 44, nom. <i>Phipps</i> |
| (c) 14 East, 601. | v. <i>Williams</i> . |
| (d) 9 Cl. & Fin. 583; 4 Man. | (e) 2 Y. & Coll. 517. |

of enjoyment and the description of the devisee: until persons having all the qualifications which the testator requires come into existence, the estate must remain contingent: *Duffield v. Duffield* (a). The age of twenty-three is a part of the description of the devisee; and, without that age, there is no gift: *Newman v. Newman* (b), *Festing v. Allen* (c), *Vawdry v. Geddes* (d).

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VICE-CHANCELLOR:—

I shall first consider this case, omitting the clause which enables the trustees to apply the interest of the children's shares in their maintenance; and afterwards consider the effect of that clause upon the question of construction.

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Now there are two classes of cases, under one or the other of which the present case must fall. One class is, where the devise is to a party at a given age, and the property is given over if the devisee dies under that age. The other is, where the description of the devisee is such as to make the given age part of that description. In cases of the former class, the Court has discovered an intention expressed in the will, that the first devisee shall take all that the testator has to give, except what he has given to the devisee over; and, in order to give effect to that intention, has held, by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over: *Phipps v. Ackers* (e). In the second class, the Court has

(a) 3 Bligh, N. S., 260.

infra, p. 573.

(b) 10 Sim. 51.

(d) 1 Russ. & Myl. 203.

(c) 12 M. & W. 279; S. C.,

(e) Ubi supra.

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held the devise contingent, upon the ground that no one could claim who could not predicate of himself that he was of the age required,—that otherwise he did not answer the entire description: (*Festing v. Allen* (a), and the cases there referred to). The question is, under which of these two classes does the present case fall? I think clearly under the second class. It is not necessary that I should say whether greater violence would be done to the language of the will in this case than was done in some of the cases of the first class,—as, for example, in the case of *Doe v. Moore* (b). The two cases are, in principle, widely different from each other, and this case, in my opinion, clearly falls under the second class.

Then does the clause as to maintenance, education, and bringing up, alter the case? I think not. That such provisions are, in many cases, material upon questions of vesting cannot be disputed; but there is nothing unreasonable or improbable in giving the benefit of maintenance, education, and bringing up, to the devisee of a contingent interest. The question is, whether I can allow that clause to have any effect upon the description of the devisee, which description, without that provision, includes, as a part of it, the age of twenty-three years. I think not. The devise is not to the children, at, or when, or if, but, in effect, to such only as attain the age of twenty-three years; and the interim gift has no legitimate bearing on the question.

(a) 12 M. & W. 279; S. C., p. 573, post. (b) 14 East, 601.

FESTING v. ALLEN.

ROGER BELK, in 1821, devised his real estates to trustees, to the use of his wife for her life, and from and after her decease or second marriage, to the use of his granddaughter *Martha Hannah Johnson* and her assigns for her life, and from and after her decease, "to the use of all and every the child or children of the said *Martha Hannah Johnson*, who shall attain the age of twenty-one years, if more than one, equally to be divided between them" as tenants in common, and to their several and respective heirs and assigns, and if but one, then to the use of such one child, his or her heirs or assigns; and for want of any such issue, upon trust, as to one moiety, to permit *Ann Johnson*, the wife of his grandson *T. R. B. Johnson*, to receive the rents and profits for her life, for the maintenance and education of all and every the child and children of his said grandson *T. R. B. Johnson*, and from and after her decease, to the use of all and every the child and children of his said grandson *T. R. B. Johnson*, "who shall attain the age of twenty-one years, if more than one, equally to be divided among them" as tenants in common, and to their several and respective heirs and assigns for ever, and if but one such child, then to the use of such one child, his or her heirs and assigns; and as to the other moiety, to stand seised and possessed thereof, to the use of *Sarah Rhodes* for her life, and from and after her decease, to the use of all and every the child and children of the said *Sarah Rhodes* "who shall attain the age of twenty-one years, if more than one, to be equally divided among them" as tenants in common, and to their several and respective heirs and assigns; and if but one such child, then to the use of such

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A devise of real estate to the use of A. for life, with remainder to the use of all and every the child or children of A. who shall attain the age of twenty-one years, and for want of such issue, over,—creates a tenancy for life in A., with a contingent remainder in fee to such of the children of A. as shall attain twenty-one; and on the death of A., leaving infant children, but having had no child who had then attained twenty-one, the interest of the children of A. was divested, and the limitations over were defeated.

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one child, his or her heirs and assigns. And if either of them the said *T. R. B. Johnson* or *Sarah Rhodes* shall happen to die without issue, who shall attain the age of twenty-one years, then the testator provided that the trustees should stand seised and be possessed of the entirety of the said real estate, to the use of the survivor of them the said *T. R. B. Johnson* and *Sarah Rhodes* for life, and from and after his or her decease, to the use of his or her child and children in such and the same manner as the original share was thereinbefore devised, in trust for them; and if both of them should die without such issue, then to the use of *Ann*, the wife of *John Butt*, her heirs and assigns.

The testator died in 1824. The widow survived him, and died in the lifetime of *Martha Hannah Johnson*, the granddaughter. *Martha Hannah Johnson* married *Thomas Festing*, and died in 1833, leaving the Plaintiffs, her three children, then infants, surviving.

Upon the bill of the children of *Martha Hannah Festing*, the granddaughter, the *Vice-Chancellor* directed a case to the Court of Exchequer, and the opinion of that Court was certified to the effect,—that, upon the death of *Martha Hannah Festing*, the heir-at-law of the testator took an estate in fee-simple in the real estate devised by the will; that, upon her death, the Plaintiffs, her infant children, took no estate or interest in such real estates, or the rents and profits thereof; and that, upon her death, neither *Ann Johnson*, nor her children, nor *Sarah Rhodes*, nor her children, took any estate or interest in such real estates, or the rents and profits thereof (a).

(a) See a full report of the arguments and of the judgment of the Court of Exchequer, 12 Mees. & W. 279.

UNDER the same will, a question arose as to the right of the Plaintiffs, the infant children of *Martha Hannah Festing*, to the application for their benefit, during their minorities, of the interest of a legacy.

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The testator gave his residuary personal estate to trustees upon trust to invest the same and stand possessed thereof, in the first place, out of the interest and annual produce to pay unto *Martha Hannah Johnson* an annuity of thirty pounds during the life or widowhood of his wife; and from and after the decease or second marriage of his wife, to pay unto the said *Martha Hannah Johnson* one annuity of forty pounds for her life, for her separate use, and from and after her decease, if she should die in the lifetime, and during the widowhood of his wife, to pay the said annuity of thirty pounds unto and for the maintenance and education of all and every the child and children of the said *Martha Hannah Johnson*, and from and after the decease or second marriage of his said wife, and the decease of the said *Martha Hannah Johnson*, then that his said trustees should, by and out of the said trust monies and the interest and annual produce thereof advance and pay the value or amount of the said annuity of forty pounds unto all and every the child and children of his said granddaughter *Martha Hannah Johnson*, if more than one, to be equally divided amongst them, share and share alike, when, and as they shall respectively attain the age of twenty-one years, and if there shall be but one, then the whole to such one child.

And there was a gift over in case of the death of *Martha Hannah Johnson* without issue, who should attain the age of twenty-one years.

death of the granddaughter without issue who should attain the age of twenty-one,—the children of the granddaughter are not entitled to the annuity or interest of the fund after the death of the widow and their mother, until they attain the age of twenty-one years.

Where a testator bequeathed an annuity to his granddaughter for her life, and directed that if she should die during the lifetime of his widow, the annuity should be paid for the maintenance of the children of the granddaughter, and that, from and after the decease of his widow and granddaughter, the value or the amount of the annuity (such a sum as would produce it according to the then legal rate of interest) should be paid to all and every the child and children of the granddaughter, if more than one, to be equally divided amongst them, when and as they should respectively attain the age of twenty-one years, and if there should be but one, then the whole to such one child, with a gift over in case of the

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By a codicil the testator declared that the value or amount of the annuity of forty pounds directed by his will to be paid unto the children of his granddaughter *Martha Hannah Johnson*, from and after her decease, should be such a sum of money as would produce, according to the then legal rate of interest, the yearly sum of forty pounds.

Argument.

Mr. *Kenyon Parker*, Mr. *Malins*, and Mr. *Shee* argued that the interest of the fund appropriated to or out of which the annuity was paid to *Martha Hannah Festing*, should be paid to or for the maintenance of the infant Plaintiffs from the time of the decease of their mother. They dwelt on the necessity for appropriating, in some events, a particular sum to answer the annuity,—on the gift of maintenance, if the widow had survived the Plaintiffs' mother,—and cited *Acherley v. Vernon* (a).

10th Dec.
 —
Judgment.

VICE-CHANCELLOR:—

If I am to read it as a legacy to the children when they attain twenty-one, it would, according to the opinion expressed by Sir *William Grant* in *Hanson v. Graham* (b), be a contingent legacy. Notwithstanding Lord *Alvanley's* decision in *May v. Wood* (c), the most favourable way of reading the will is to consider the words "to be divided" as equivalent to the words "to be paid," so as to make the gift to the children immediate, with a postponement only of the time of payment. This being the only construction of the will which can give the children a vested interest in the legacy, I will,

(a) 1 P. Wms. 783.

(b) 6 Ves. 239.

(c) 3 Bro. C. C. 471.

for the present purpose, so construe this will in the children's favour, although the legacy (as I understand the will) is given over, if all the children die under twenty-one.

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 —
Judgment.

Then, what is the rule of the Court with respect to vested legacies payable at a future day? The admitted rule is, that the legacy does not carry interest until the day of payment shall have arrived. By what reasoning am I asked to give interest upon this legacy before the day of payment? It is first said, that maintenance is given in another case on the death of the mother. I admit that as a reason for believing that I may disappoint the real intention of the testator, if I do not give interest before the children attain twenty-one, in the event which has happened. But the question to which I am confined is, whether the testator has given such interest in fact, or said that which can justify me in deciding that he has, in this case, manifested an intention to give it? Then, stress was laid upon the words "from and after." But I have already given full effect to these words in treating them as evidence that the gift of the legacy was immediate, and the payment only as postponed; unless the words are to be read as directing a severance of the legacy from the bulk of the estate, and unless such direction is to have the effect of entitling the legatees to claim interest upon the legacy,—which was the third point relied upon for the legatees.

Now, although a direction to sever a legacy from the bulk of an estate has often been relied upon as an argument favourable to a claim of interest upon a deferred legacy,—*Acherley v. Vernon (a)*, *Boddy v. Dawes (b)*,

(a) 1 P. Wms. 783.

(b) 1 Keen, 362.

1842.

FESTING

v.

ALLEN.

Judgment.

Saunders v. Vautier (a), *Vaudry v. Geddes* (b), *Lister v. Bradley* (c),—it is impossible to hold that the mere necessity of making such a severance in some events only (as in the case of the residue becoming payable before the legacy itself is payable, or other cause unconnected with the legacy itself) can have the effect of giving interest upon a deferred legacy before it becomes payable. There is not one instance in twenty of deferred legacies in which that might not happen. In this case, however, it was said that the necessity of providing for the mother's annuity would, in certain events, render a severance of the legacy necessary, and that whatever might become necessary in the execution of such a trust of the will, must be considered as directed by the testator himself, although, in terms, no severance may be directed. My observation upon this is, that so far as the language of the will goes, the testator clearly supposes the mother's annuity will be paid out of interest arising upon the undivided corpus of the estate, and as the legacy is given over in the event of *Martha Hannah* dying without issue who live to attain the age of twenty-one, I cannot think the will shews that severance of the legacy from the bulk of the estate was in the contemplation of the testator, only because in certain events the executors might be obliged to pay over the residue before the destination of the legacy was determined. Besides, that the amount given to the children at the time at which it is given, is not necessarily the same sum as might have been required to provide for the mother's annuity in the event of the residue becoming payable in her lifetime, is manifest from the direction in the codicil as to the mode of ascertaining the amount of the children's legacy.

(a) 1 Cr. & Ph. 240.

(b) 1 Russ. & Myl. 208.

(c) 1 Hare, 10.

With respect to the case of *Acherley v. Vernon* (a), that case proceeded partly upon the ground that the testator had placed himself in loco parentis to the legatee, —and that case has rarely been cited without drawing from the Court the observation that it was a case depending upon special circumstances,—as in *Crickett v. Dolby* (b) and *Hearle v. Greenbank* (c). It was, however, said, that the testator here was in loco parentis; but that is not implied from a gift to grandchildren *per se*: 2 Roper, Leg. 224. And here there is nothing but that relationship.

1842.
 FESTING
 v.
 ALLEN.
 Judgment.

Upon the whole, though I may disappoint the real intention of the testator, it is better to do that than to introduce distinctions so subtle that they simply subvert a general rule, without being themselves capable of reduction to any definite principle.

UPON the certificate of the Court of Exchequer as to the real estate,

1844.
 5th July.

Mr. *Lowndes* and Mr. *W. T. S. Daniel*, for the heir-at-law, asked that the bill might be dismissed as against him, with costs.

Mr. *Kenyon Parker*, Mr. *Malins*, and Mr. *Shee*, contra.

The VICE-CHANCELLOR gave no costs.

(a) 1 P. Wms. 783. (b) 3 Ves. 10. (c) 3 Atk. 697, 716.

1847.

24th and 25
June.

13th July.

The testatrix devised and bequeathed the rents, issues, and profits of her real and personal estate to her sister for life, and upon and after her decease, upon trust to sell the real estate, and pay the money arising therefrom to such persons as the testatrix should, by any codicil, direct; and, if she should not bequeath the same by any codicil, then to pay the same unto and amongst her next of kin: and, by her codicil, the testatrix revoked the former devise and bequest made by her will, and devised and bequeathed all the said real and personal estate to other trustees, upon the like trusts, but directed that all "the said residue" should be paid to her next of kin on the part of her mother, and not to any of her next of kin on the part of her father:—*Held*, that the testatrix died intestate as to the residuary personal estate.

SAY v. CREED.

CATHARINE ASTLEY, by her will, dated in 1815, devised her real estate to trustees upon the trusts thereafter mentioned, and she bequeathed her personal estate and effects to the same trustees, subject to the payment of her debts, funeral and testamentary expenses and legacies, upon the trusts thereafter mentioned. And the testatrix directed her trustees, as soon as conveniently might be, after her decease, to convert all such part of her said personal estate, as should not consist of money or security for money, into money, and invest the same upon real or Government securities; and she empowered her trustees to continue out at interest all such monies as she had then at interest, and also to call in and re-invest all or any part of her personal estate as the said trustees, or the survivor, his executors, &c., should think fit. And the testatrix then declared that the said devise and bequest of her said real and personal estates were made to the said trustees upon trust, that they should receive and take all the rents, issues, and profits of all her said real and personal estates, and pay the same unto her mother, *Catharine Astley*, and her assigns, for her own use and disposal, during her life, and from and after her decease, upon trust to pay the same unto her sister, *Lucy Brown*, for her separate use; and from and after the decease of her said mother and sister, upon trust to sell the said real estates, and the money arising therefrom, together with all the rents and profits thereof, from the last payment made to the sur-

That the next of kin of the testatrix, ex parte maternâ, at the death of the tenant for life, were, under the codicil, entitled to the proceeds of the real estate.

vivor of her said mother and sister, should be paid by the said trustees (after deducting the charges of executing the said trusts) unto such person or persons, and in such manner and form, "to whom" she should, by any codicil, note, or memorandum, give or bequeath the same. But in case she should not, by any codicil, note, or memorandum, give and bequeath the said monies, or not thereby give, bequeath, and dispose of the whole thereof, then the testatrix directed that the same, or such part thereof as should not be disposed of, should be paid by the said trustees unto and amongst her next of kin, in due course of administration, as the law directs in respect of intestates' personal estates.

1847.
 SAT
 V.
 CREED.
 —
Statement.

The testatrix made a codicil to her will, dated in 1818, reciting that she had, by her will, devised her real estates upon the trusts "hereinafter" mentioned, and that she had bequeathed her personal estate upon the trusts "thereinafter" mentioned, and she then, by the codicil, revoked such devise and bequest, and thereby gave, devised, and bequeathed all her real and personal estate and effects whatsoever unto other trustees, their heirs, executors, administrators, and assigns, to, for, and upon the like trusts, and subject, and with the same powers and authorities, as in her said will mentioned. "But," the testatrix proceeded, "I do hereby revoke and declare that, in case I shall not make any further codicil to this my will, and dispose of the residue directed by my said will to be paid to my next of kin, I do hereby will and direct that all the said residue shall be paid to my next of kin on the part of my said mother only, and not to any of my next of kin on the part of my late deceased father." And the testatrix appointed the same trustees to be the executors of her will and codicil. The testatrix died in November, 1828.

1847.

SAY

v.

CREED.

Statement.

Lucy Brown, the sister of the testatrix, and the tenant for life under her will, survived the testatrix. She was the sole next of kin of the testatrix living at the time of her death, and she was also, at the same time, the only next of kin of the testatrix on her mother's side. Excluding *Lucy Brown*, the tenant for life, the person who, at the death of the testatrix stood nearest in the relation of next of kin of the testatrix on her mother's side, was *Phillip Bell*, an uncle of the testatrix.

Lucy Brown, the tenant for life, died in June, 1843. *Phillip Bell* was then dead; and the next of kin of the testatrix, on her mother's side, living at the death of *Lucy Brown*, were his children and others in the same degree of relation. The Plaintiff was the personal representative of *Lucy Brown*. The Master found the several sums, which had been produced by the real and personal estate respectively, and the amount of the residue. On hearing the cause for further directions,—

Argument.

Mr. *Rolt* and Mr. *Roundell Palmer*, for the Plaintiff.

Mr. *Romilly* and Mr. *Malins*, Mr. *Walpole* and Mr. *Fleming*, Mr. *Chandless* and Mr. *Surrage*, for next of kin of the testatrix, ex parte maternâ, living at her death, excluding *Lucy Brown*.

Mr. *Wood* and Mr. *Prior*, for the next of kin of the testatrix, living at the death of *Lucy Brown*.

On the part of the Plaintiff, it was contended that the residuary personal estate was not disposed of by the will or codicil, and, therefore, that the representative of

the testatrix's next of kin was entitled to it. For the Defendants, who had no claim except under the will, or whose interests were greater under the will than as belonging to the class of next of kin, it was argued that the personal estate was disposed of. On this point the cases of *Crooke v. De Vandes* (a), *Leighton v. Bailie* (b), and *Rayner v. Monbray* (c), were cited.

1847.
 SAY
 v.
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 —
Argument.

On the question, who were entitled, under the limitation to the next of kin of the testatrix, on the part of her mother, and not on the part of her father, the authorities cited were—cases in which a gift to next of kin has been construed next of kin living at the death of the testator, and the tenant for life has been included in the benefit of the limitation: *Elmsley v. Young* (d); *Jenkins v. Gower* (e): cases in which it has been construed next of kin living at the death of the tenant for life: *Jones v. Colbeck* (f), *Miller v. Eaton* (g), *Briden v. Hewlett* (h), *Butler v. Bushnell* (i), *Minter v. Wraith* (k), *Booth v. Vicars* (l), *Clapton v. Bulmer* (m): and a case in which the gift had been construed next of kin living at the death of the testator, but excluding the tenant for life from the benefit of the limitation: *Bird v. Wood* (n). In this case the peculiarity was observed upon, that not only was the limitation in favour of the next of kin on the mother's side, but the next of kin on the father's side were expressly excluded.

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|------------------------------------|-----------------------|
| (a) 9 Ves. 197. | (g) Sir G. Coop. 272. |
| (b) 3 Myl. & K. 267. | (h) 2 Myl. & K. 90. |
| (c) 3 Bro. C. C. 234. | (i) 3 Myl. & K. 232. |
| (d) 2 Myl. & K. 82; <i>S. C.</i> , | (k) 13 Sim. 52. |
| <i>Id.</i> 780. | (l) 1 Coll. 6. |
| (e) 2 Coll. 537. | (m) 5 Myl. & Cr. 108. |
| (f) 8 Ves. 38. | (n) 2 Sim. & St. 400. |

1847.

SAY

v.

CREED.

Judgment.

VICE-CHANCELLOR:—

Two questions have been argued before me,—first, whether the personal estate of the testatrix is included in the bequest contained in her codicil to her next of kin on the part of the mother, or whether the testatrix died intestate as to such personal estate; and, secondly, who are the persons entitled, under the bequest in the codicil to such next of kin.

The case has this peculiarity—that the decision upon either point, separately taken, may affect the decision upon the other point. Thus a decision that, according to the construction of the words of the gift, the testatrix had given the proceeds of the sale of her real estate, at her death, to the same persons to whom the law, without any disposition, would at that time give her personal estate, would meet (if, indeed, it did not displace) the argument founded upon the improbability that the testatrix intended, in this case, to die intestate as to her personal estate. Again, a decision that the next of kin, to take under the codicil, were the parties answering the description of the next of kin at the death of *Lucy Brown*, would leave that argument in force. In considering the case, I have endeavoured to follow the rule to which I shall more particularly advert, of construing the words of the testatrix in their natural sense, inquiring what the testatrix intended, by examining her words in all parts of the will.

For the purpose of trying the question of intestacy, I will suppose, first, the next of kin, to whom the bequest is made in the codicil, to mean next of kin living at the death of *Lucy Brown*. Assuming that to be so, after repeated considerations of the will and codicil, my conclusion is, that in the will the proceeds of the sale

of the real estate only are given to the testatrix's next of kin. If so, the gift in the codicil described as "the residue, directed by my said will to be paid to my next of kin," cannot be more extensive. That such is the plain and grammatical construction of the will I cannot doubt, unless that meaning can properly be altered or modified by reason of some inherent force in the word residue in the codicil. The proceeds of the sale of the real estate is the last antecedent, and the use of the word "but" emphatically limits the reference to that antecedent. It appears to me also, that the testatrix *generally*, in her will, when directing a conversion of her property, correctly says into "money," in the singular number, speaking of the real and personal estate; but, when she speaks of money then existing, she calls it "monies." This change of expression would be correct according to legal phraseology; but, I confess, that the observation upon it appears to me much too critical to be a safe guide as to what the testatrix meant. The observations upon the word "residue," in the codicil, appeared to me, at one time, to be more deserving of attention, as shewing that the testatrix, by the use of the word residue in the codicil, expressed what she supposed she had done by her will; but I am satisfied that the word cannot *per se* produce the effect contended for. The testatrix, by the codicil, expressly sends me back to the will to ascertain the meaning of the word "residue," and, when I look at the will, I find that it is confined to the real estate, which is there given in express terms, subject to the payment of certain charges and expenses, which are directed to be paid out of the proceeds. Taking the words, therefore, in their strict and natural sense, it appears to me that there is no ground whatever for saying that the will and the codicil go beyond the proceeds of the real estate.

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 SAY
 v.
 CARRD.
 Judgment.

1847.

SAY

v.

CREED.

Judgment.

Nothing, then, remains upon this part of the case except the argument, which has been founded upon this, that the testatrix (upon the supposition I am now proceeding upon), has given the residue of her real estate by her will to next of kin living at the death of *Lucy Brown*, and has left her personal estate to go, according to law, amongst her next of kin living at her own death. That this, if intended, was capricious, I do not deny; but it is not so capricious or extravagant as to justify me in giving to the testatrix's language a meaning which it does not bear. If I were at liberty to act upon conjecture, I should probably come to a different conclusion; but, in deciding on the claims of the next of kin living at the death of *Lucy Brown*, and who cannot therefore have been personally and individually objects of the testatrix's bounty, it is not upon conjecture that I should be justified in departing from the letter of the will. I may observe, also, though I do not rely upon it, that the general structure of the codicil favours the literal construction of the words.

The next point is, as to the persons who are to take the residue given by the codicil. The question is, whether the assumption I have hitherto made use of is correct or not. The persons who claim are, first, the Plaintiff, who claims as representing the sole next of kin, ex parte maternâ, living at the death of the testatrix, although the party whom he represents was next of kin also ex parte paternâ. The second class of claimants comprises the persons who, if *Lucy Brown* had died in the lifetime of the testatrix, would have been her next of kin ex parte maternâ. The other claimants are the only next of kin of the testatrix, ex parte maternâ, living at the death of *Lucy Brown*; and my opinion is, that the last class of persons, the next of kin, ex parte maternâ, of

the testatrix living at the death of *Lucy Brown* are the persons to whom the property is given.

The rule of law as laid down, and, I believe, correctly, in modern cases, is, that the words of the will, in cases of this description, are to be construed in their strict and proper sense, unless, from the context, it appears that they were used in some other sense, or unless the circumstances of the case exclude it. The rule was applied in *Holloway v. Holloway* (a), and has since been followed in numerous cases, of which *Jenkins v. Gower* (b) and *Seifferth v. Badham* (c) are examples; and upon that rule I have repeatedly acted in cases like the present. According to those authorities, where a testator gives property to a tenant for life, and, after the death of the tenant for life, to his next of kin, and there is nothing in the context to qualify, or in the circumstances of the case to exclude, the natural meaning of the testator's words, the next of kin of the testator living at his death will take; and, if the tenant for life be such next of kin, either solely or jointly with other persons, he will not on that account only be excluded. This rule is generally admitted; but it must, I think, be admitted also, that it has been much relaxed in some modern cases (d),—as much perhaps as it safely can be consistently with the preservation of the rule itself. That relaxation is favourable to my conclusion in this case, although I believe it is not necessary that I should rely upon it. In applying the rule to this case, the Court is bound, as Lord Brougham observed in *Guy v. Sharp* (e), and as has been said in other cases, to place itself in the situation of the testa-

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SAY
v.
CREED.
Judgment.

(a) 5 Ves. 399.

(b) 2 Coll. C. C. 537.

(c) M. R. 27th & 28th Feb.

1846. Reported 10 Jurist, 892.

(d) See 2 Jarm. Wills, 54 et

seq.

(e) See 1 Myl. & K. 602.

1847.

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v.

CREED.

Judgment.

tor, and inquire what the testator's words express, when used by a person in that situation. Now, in this case, the will and codicil speak, at the latest, at the death of the testatrix. At the date of the codicil, the father and mother of the testatrix were dead, for she speaks of her late father, and she had no brother or sister living, except *Lucy Brown*, nor any child of a brother or sister. It was, therefore, of necessity, that, if *Lucy Brown* survived her, which she must have contemplated would be the case, that *Lucy Brown* would be her only next of kin living at her death. When, therefore, the testatrix, in such circumstances, described her next of kin, to whom she has given her property, in terms which import that she contemplated a plurality of persons under that description, the question is, whether her words, if properly interpreted, do not describe some persons other than *Lucy Brown*. Without expressing any opinion of my own upon the case of *Jones v. Colbeck* (a), decided by Sir *William Grant*, I may observe, that it is an authority for the proposition that the words must be so interpreted. Again, *Lucy Brown*, whom the testatrix, at the date of her will and codicil, knew would be her sole next of kin, if she survived her, is tenant for life of the whole of the fund; and although that might be immaterial in cases otherwise circumstanced, as in *Holloway v. Holloway*, *Jenkins v. Gower*, *Seifferth v. Badham*, and the cases there referred to, it has been considered material in a case so circumstanced, *Miller v. Eaton* (b); upon which case also I abstain from expressing any opinion. And without giving any opinion upon the case of *Bird v. Wood* (c), it may be observed, that it is a case clearly distinguishable from the present, upon the direction contained in the will respecting the vesting, upon which the *Vice-Chancellor* principally relied.

(a) 8 Ves. 38.

(b) Sir G. Coop. 272.

(c) 2 S. & St. 400.

I have considered the party in whose favour I decide this case, as entitled to the benefit of the observation, that the cases of *Jones v. Colbeck* and *Miller v. Eaton* are in his favour; but I purposely abstain from resting my own decision upon them. The argument against the claim by the other next of kin, upon which I decide this case, is, that the testatrix, at the date of the codicil, knew that *Lucy Brown*, if she survived her, would be her next of kin *ex parte paternâ*, as well as *ex parte maternâ*; yet, in her codicil, in which, for the first time, she distinguishes the next of kin one from the other, she describes the objects of her bounty as next of kin on the part of her mother, and not next of kin on the part of her father. That appears to me to lead to the same construction as would be deduced from the authority of the cases I have referred to.

1847.

SAY
v.
CREED.

Judgment.

BRADLEY v. BARLOW.

13th and 16th
July.

THOMAS POTTS, by will, dated in 1810, bequeathed 500*l.* to trustees, upon trust, at the expiration of one year next after the testator's decease, to invest the same, and to pay the interest and dividends thereof unto or for the use of *Anne Ellem*, wife of *Peter Ellem*, for and during her life, for her separate use; and from and after her decease, in trust to pay the said interest and dividends unto the said *Peter Ellem* for his life, and from and after the death of the survivor of *Peter Ellem*

Legacy to
Anne, the wife
of *Peter*, for
life, remainder
to *Peter*, the
husband, for
his life, and,
after the death
of the husband
and wife, upon
trust to pay the
interest for the
maintenance of
such children
of *Anne* as
should be

living at her death, until they should respectively attain twenty-one, and when and as they should severally and respectively attain their said ages of twenty-one years, upon trust to pay and transfer the legacy equally unto and amongst all the children of *Anne*, when and as they should severally and respectively attain their said ages of twenty-one years; and, if any of the said children should die under twenty-one, then unto such as should attain that age, share and share alike; and, in case all and every of the said children should die under age, then to pay the legacy to the testator's next of kin. The children of *Anne*, who attained twenty-one years of age, acquired vested interests in the legacy, notwithstanding such children died in the lifetime of *Anne*, the tenant for life.

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BRADLEY
v.
BARLOW.

Statement.

and *Anne* his wife, in trust to pay, apply, and dispose of the interest and dividends of the said sum of 500*l.*, or a sufficient part thereof, for and towards the maintenance, education, support, and bringing up of such child or children of the said *Anne Ellem* as should be living at the time of her death, until such children should severally and respectively attain their several and respective ages of twenty-one years; and when and as they should severally and respectively attain their said ages of twenty-one years, in trust to pay, assign, and convey the said sum of 500*l.*, with the interest, dividends, and produce thereof, as should not have been applied for putting any or either of them to business, or otherwise advancing any or either of them in life, pursuant to the power thereafter for that purpose contained, equally unto and amongst all the children of the said *Anne Ellem*, when and as they should severally and respectively attain their said ages of twenty-one years. And in case any or either of the said children of the said *Anne Ellem* should happen to die before having attained twenty-one years, then in trust to pay, assign, transfer, and convey the said sum of 500*l.*, and the interest, dividends, and produce thereof, or such part thereof, as should remain unapplied as aforesaid, unto such of the children of the said *Anne Ellem* as should live to attain his, her, or their respective age or ages of twenty-one years, share and share alike, if more than one; but in case all and every of the said children of the said *Anne Ellem* should happen to die under age, then in trust to pay, assign, transfer, and convey the said sum of 500*l.*, and the interest, dividends, and produce thereof, or such part thereof as should remain unapplied as aforesaid, unto the testator's next of kin, according to the Statute of Distribution of intestates' personal estate and effects; and he thereby empowered and directed his trustees to pay, assign, transfer, and convey the same accordingly.

There was a subsequent gift to *Amelia Oldham*, for her life, remainder to any husband with whom she might intermarry for his life, and a trust to apply the interest for the maintenance of all and every such child or children of the said *Amelia Oldham*, as she should have living at the time of her decease, until they should attain twenty-one, and to transfer the capital unto and amongst all the said children of *Amelia Oldham*, when they should respectively attain twenty-one, and a gift over in case of the death of all the said children under age and without leaving issue. In case of the death of *Amelia Oldham* under twenty-one, a sum bequeathed to her was given unto such of several persons (*J. Lock*, *T. Taylor*, and others) as should be living at the time of the decease of *Amelia Oldham*, equally; and if any of them should have died in her lifetime, leaving issue, the share of the person so dying to be transferred to such issue. And the testator bequeathed the residue of his personal estate to *John Taylor*, his executors, administrators, and assigns.

1847.
 {
 BRADLEY
 v.
 BARLOW.
 —
Statement.

The 500*l.* was invested by the executors in stock, which was afterwards converted into 572*l.*, 3*l.* 5*s.* per Cent. Annuities. The dividends were paid to *Anne Ellem*, until her death in 1841. *Anne Ellem* had four children, *Mary*, *William*, *Anne*, and *John*. *Mary*, *Anne*, and *William* attained their ages of twenty-one years, and died in the lifetime of *Anne Ellem*, their mother. *John* died in her lifetime without having attained twenty-one.

The bill was filed by the personal representatives of *Mary*, *Anne*, and *William*, against the executors of *P. Barlow*, the last survivor of the trustees,—the next of kin of the testator at the time of his death,—and the assignee of the residuary legatee, praying that the 572*l.*

1847.
 {
 BRADLEY
 v.
 BARLOW.

Argument.

stock, and the dividends since the death of *Anne Ellem*, might be transferred and paid to the Plaintiffs respectively, as such personal representatives.

Mr. *Tinney* and Mr. *Bagshawe*, for the Plaintiffs:—

The ruling words of the bequest are the words which direct a division of the fund amongst the children of *Anne Ellem* when they shall attain the age of twenty-one years: this constitutes a gift in remainder expectant upon life-estates, and is followed by a gift over to the next of kin in case of the death of the children under age. The reference to children living at the death of *Anne Ellem*, is a part of the maintenance clause, which does not cut down the substantial gift.

Mr. *Lee*, for the next of kin:—

The trust declared of the fund, is for such of the children of *Anne Ellem* as shall be living at the time of her death. In a subsequent gift, made in a similar form, to the children of *Amelia Oldham*, the language is rendered entirely unequivocal by the word “said,” identifying the objects to whom the corpus is bequeathed with those to whom maintenance is given. But the meaning of the language is obviously the same: *Archer v. Jegon* (a). The gift to the next of kin, in the event of the death of the children of *Anne Ellem* under age, has therefore taken effect: *M’Kinnon v. Sewell* (b). The rule of construction adopted by the Court in the case of *Say v. Creed* (c) supports this conclusion.

Mr. *Anderdon* and Mr. *Hislop Clarke*, for the assignee of the residuary legatee, contended that the gifts to the children of *Anne Ellem* had failed by their death in her

(a) 8 Sim. 446.

(b) 2 Myl. & K. 202.

(c) *Supra*, pp. 587 *et seq.*

lifetime; that the gift to the next of kin had not taken effect, inasmuch as all the children had not died under age; and that the fund passed under the residuary gift: *Greene v. Ward* (a).

1847.
 {
 BRADLEY
 v.
 BARLOW.
 —
Argument.

VICE-CHANCELLOR:—

Before the argument on this case commenced, and on the same day, I gave judgment in the cause of *Say v. Creed* (b), in which (as in the principal cause) I had to determine the construction of a will. Some expressions which I made use of in explaining the grounds of my judgment in *Say v. Creed*, were cited by the Defendants' counsel in the present case. Now I certainly intended to lay down no new proposition by what I said in *Say v. Creed*, and I probably should have said nothing as to the general rules by which the Court should be governed in construing a will, if it had not been that two cases decided by a judge of the highest authority (I refer to *Jones v. Colbeck* (c) and *Miller v. Eaton* (d)) had been pressed upon me as authorities (as they certainly were authorities) for the conclusion I came to respecting the next of kin in that case. I was anxious, in referring to these cases, to observe that I considered them as admitting the general rule of construction I had laid down; and that if those cases were unsatisfactory, (upon which I gave no opinion), they were so not upon the ground that they impeached the general rule, but that such rule had been ill applied in them; an observation which (I conceive) applies also to *Briden v. Hewlett* (e) and some other modern decisions. In *Say v. Creed* the restriction in favour of heirs ex parte maternâ only,

Judgment.

(a) 1 Russ. 262.

(b) Supra, p. 580.

(c) 8 Ves. 38.

(d) Sir G. Coop. 272.

(e) 2 Myl. & K. 90.

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was alone sufficient to decide that case, and upon that I decided it. But as *Jones v. Colbeck* and *Miller v. Eaton* have never been overruled, I thought myself bound to give the Plaintiff the benefit of the observation, that they were authorities in his favour.

In the present cause I have no doubt upon the construction of the will, within the limits of the rule which obliges me to ascertain the testator's intention from what he has said, and from that alone. In doing this, I shall begin by excluding the life-interest of *Peter Ellem*, the husband. [His Honor read the will to the end of the limitation to the children of *Anne Ellem*,—leaving out the gift to *Peter Ellem*.] Now, if the will had given no life-estate to *Peter*, and had stopped where I have stopped, I should scarcely have thought it admitted of doubt but that any child of *Anne* who attained twenty-one in her lifetime would take a vested interest. It is true the direction as to maintenance applies in terms to children living at her death; but it is obvious that the direction is so limited only because the testator is speaking of them as supposed minors at that time. It cannot be successfully argued that it was necessary that a child of *Anne* should be a minor at her death, in order to bring herself within the gift; and if that is excluded, there is nothing in the words of the will which conflicts with the construction contended for by the Plaintiff, and much that requires it: but when the clause of the will is read which describes the event upon which the legacy is given over (*a*), that conclusion is satisfactorily confirmed. Upon that clause it is manifest that *Anne Ellem* and her children were to take whatever was not given to the legatee over. The life-interest in *Peter Ellem* rather confirms this construction than

(a) *Supra*, p. 590.

otherwise; for it explains some apparently conflicting directions in the will, but without being admissible as a ground from which to infer that the gifts to the children of *Anne* were not such as they would have been, if no life-estate were given to *Peter*.

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The bequest to *Amelia Oldham* and her children, and I may add the contingent bequest of 3,000*l.* reduced annuities to *John Lock*, *Thomas Taylor*, and the others, also appear to me rather to confirm my view of the question in this cause; for, although in these cases the legacies are given over in case of the deaths of the legatees before they become entitled in possession, there is a substituted bequest to their issue in case any should die leaving issue, a provision which is not found in the bequest now in question.

STAHLSCHMIDT v. LETT.

6th and 7th
July.

A DEFENDANT in the original suit having become bankrupt, his assignees were brought before the Court by supplemental bill, and a decree pronounced at the hearing. The Registrar, before passing the decree, suggested that the bankrupt ought to have been served with the subpoena to hear judgment.

Where a defendant becomes bankrupt after the institution of the suit, and his assignees are made parties by supplemental bill, it is not necessary to bring the bankrupt to the hearing, by serving him with the subpoena to hear judgment.

Mr. *Freeling* mentioned the point, and submitted that it was not necessary, and had not been the practice to bring the bankrupt to the hearing, all his interest having passed to his assignees. *Robertson v. Southgate* (a) was mentioned.

(a) *Supra*, p. 223.

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The VICE-CHANCELLOR said it was not necessary to serve the bankrupt with the subpoena to hear judgment, his estate being vested in the assignees. One decree was made in both suits. If the allegation of the bankruptcy made in the supplemental bill, and admitted by the answer in that suit, were untrue, the bankrupt would not be prejudiced, for the decree was in that case made in his absence and would not bind him.

17th July.

COLLINS v. GREAVES.

Pending a reference of title, ordered upon motion, in a suit for specific performance, the defendant cannot, under the 114th Order of May, 1845, dismiss the bill for want of prosecution.

PUBLICATION passed, and the time specified in the Order CXIV. s. 4, of May, 1845, subsequently elapsed without proceedings.

Mr. *Rolt*, for the Defendant, moved to dismiss the bill for want of prosecution.

Mr. *Malins* opposed the motion.

It appeared that the suit was for specific performance of a contract for sale, and that some months before publication passed an order was made upon motion, referring it to the Master to inquire whether a good title could be made to the property comprised in the contract.

The VICE-CHANCELLOR said that the pendency of the order of reference was an answer to the motion. Either party might procure a report.

Motion refused, with costs.

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WILLETTS v. WILLETTS.

23rd and 31st
July.

AN affidavit of the service of an order did not describe it as having been "duly passed and entered," which is the usual form of deposition.

An affidavit of the service of an order of the Court, must state that such order was "duly passed and entered."

Mr. *Craig* asked that the proof of service might be treated as effectual, notwithstanding the omission. The Registrars differed in opinion as to the sufficiency of the affidavit. The order had actually been duly passed and entered.

The VICE-CHANCELLOR said that he should be governed by the practice of the Court, which required the affidavit to contain the averment which was wanting in this case, until that practice was altered by the Lord Chancellor's authority.

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19th, 21st, &
22nd June.
18th July.

MAJOR v. WARD.

Stephen took a conveyance of an estate from *William*, his father, and then mortgaged the estate, with a power of sale on default of payment of the mortgage money and interest within three months after notice, in writing, given to *Stephen*, his heirs, executors, administrators, or assigns, or left at his or their usual or last known place of abode. The conveyance to *Stephen* from *William* was afterwards declared void, as against the creditors of *William*. Some years afterwards, the mortgagee caused the notice demanding payment to be affixed to the door of the house which was the last known place of abode of *Stephen*; and the mortgagee, a short time before the expiration of the three months, entered into a contract for the sale of the property:—*Held*, that as the right of the mortgagee under the power of sale was paramount to that of the creditors of *William*, the notice to *Stephen* was sufficient.

That such notice was well served by being fixed on the door of *Stephen's* last known place of abode.

That the contract for sale of the property, although made before the expiration of the notice, was not therefore invalid.

EXCEPTIONS to the Master's Report, in a vendor's suit, finding that a good title could be made to a tenement called "Old Hall," and three acres of land in *East Hendred*.

One objection was, that due notice had not been given of the sale, which had been made by the mortgagee under the powers contained in the mortgage deed; and another was, that an allotment of common land, part of the estate described as having been allotted to the mortgagor in lieu of four acres of common field land, was not shewn to have been allotted to him in lieu of the four acres of land which were formerly occupied or enjoyed with the tenement called "Old Hall."

The tenement called "Old Hall," and four acres of arable land, dispersed in the common field of *East Hendred*, belonging to the said tenement, or therewith usually occupied or enjoyed, and an acre and half of arable land, also in the said common field, were conveyed to one *Beasley* and his heirs, by a deed dated in December, 1784. *Beasley* devised the premises to *William*, his son. In January, 1818, *William Beasley*, the son, mortgaged the property in fee to *Mary* and *Rebecca Smith*, for securing 400*l.* and interest. In the

mortgage deed the parcels are described as a messuage or tenement in *East Hendred*, called Old Hall, with the malt-house, stable, and outbuildings thereto next adjoining, together with the garden, orchard, and plot of arable land following; viz. all that allotment of land adjoining to the said messuage or tenement, containing by admeasurement 3 acres and 1 rood (be the same more or less), and which said allotment of land was in part by the award of the commissioners appointed in and by an act of Parliament made and passed in the 41st year of Geo. III., intituled "An Act for dividing and allotting that part of the parish of *East Hendred* called *Westmanside*, in the county of *Berks*," allotted, awarded, and confirmed unto *William Beasley*, for and in lieu of four acres of common field land, and which said allotment of land was then laid down in meadow, fenced, and well planted with trees.

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In 1822, *Rebecca Smith* died, leaving *Mary*, and *Ann*, another sister, her co-heiresses at law, having also appointed them her executors and residuary legatees. By a settlement made upon the marriage of *Ann*, in October, 1827, one moiety of the 400*l.* secured by the mortgage of 1818, with other property of *Ann*, were assigned to trustees, upon the trusts of the marriage settlement. By indentures of July, 1828, *William Beasley* further charged the property with 100*l.* in favour of *Mary Smith*, subject to the 400*l.* secured by the prior mortgage. By indenture, dated the 13th and 14th of September, 1833, in consideration of the payment of the 400*l.*, and 100*l.* expressed to be paid by *Stephen Beasley* to *Mary* and *Ann Smith*, the property was conveyed by the mortgagor and mortgagees to such uses as *Stephen Beasley*, the son of *William*, should appoint, and subject thereto to uses to bar dower, with remainder to the use of *Stephen*, his heirs and assigns.

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By indentures, dated the 23rd and 24th of September, 1833, *Stephen Beasley* conveyed the same property to *Thomas Major*, the Plaintiff, in fee, by way of mortgage, to secure 500*L*. and interest; and it was by the mortgage-deed provided and declared, that in case default should be made by the said *Stephen Beasley*, his heirs, executors, administrators, or assigns, in payment of the said sum of 500*L*., or the interest for the same, or any part thereof respectively, on the days and times thereinbefore appointed for payment thereof respectively, the said *Thomas Major*, his executors, administrators, and assigns, should at any time or times thereafter give notice, in writing, to the said *Stephen Beasley*, his heirs, executors, administrators, and assigns, or cause the same to be left at his or their usual or last known place of abode or residence, requiring payment of the said sum of 500*L*., and the interest for the same, or so much thereof respectively as should then remain unpaid; and if the said *Stephen Beasley*, his heirs, executors, administrators, and assigns, should make a further default in payment of the same, or any part thereof, for the space of three calendar months next after delivery of any such notice as aforesaid, then, and in any such case, it should and might be lawful to and for the said *Thomas Major*, his heirs and assigns, at any time or times thereafter absolutely to sell, convey, or dispose of the said hereditaments and premises thereby appointed, granted, and released, or intended so to be, either entirely and altogether, or in parcels, by public auction or private contract, or partly by public auction and partly by private contract, to any person or persons willing to become the purchaser or purchasers thereof, for such price or prices, or such sum or sums of money as to the said *Thomas Major*, his heirs or assigns, should seem proper, with full power and liberty to purchase in the same at any public auction, without liability for any

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loss to be incurred thereby ; and for the purpose of any such sale or sales to enter into, make, and execute all such contracts, covenants, and agreements, conveyances, assignments, assurances, deeds, acts, matters, and things, as to the said *Thomas Major* the elder, his heirs and assigns, should seem reasonable. And it was further agreed and declared, that all such contracts, conveyances, and assurances, made or executed by the said *Thomas Major*, his heirs or assigns as aforesaid, with or without the concurrence of *Stephen Beasley*, his heirs or assigns, should be effectual and binding ; and that the said *Thomas Major* should stand possessed of the monies to be produced by such sale, upon trust to pay the costs and expenses thereof ;—the said sum of 500*l.* and interest ; and as to the surplus, upon trust for *Stephen Beasley*, his heirs, executors, administrators, or assigns. *Thomas Major* took a further charge of 150*l.* and interest on the same property in October, 1833.

The indentures of the 13th and 14th of September, 1833, whereby the property was conveyed from *William* to *Stephen Beasley*, were, by a decree in a creditor's suit, made in 1840, declared to be void, as against the creditors of *William Beasley*.

In November, 1841, *Thomas Major* claimed to be a creditor of *Stephen Beasley* under the mortgage for the principal and an arrear of interest, making together 693*l.* 17*s.* 6*d.* ; and he caused a notice, dated the 24th of November, 1841, to be prepared, requiring *Stephen Beasley* to pay that amount, and all expenses, on or before the expiration of three calendar months from the date thereof, which was the 24th of November, 1841, or that he *Thomas Major* should proceed to a sale of the premises according to the powers vested in him by the mortgage deed. This notice was not served upon

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Stephen Beasley otherwise than by affixing it upon the door of a house, alleged to have been his last known place of abode. On the 18th of November, 1841, before the time mentioned in the notice had expired, *Thomas Major* entered into the contract for the sale of the property to the defendant at the price of 700*l.*, which contract was the subject of the suit.

Argument.

Mr. *Lee* and Mr. *Heathfield*, for the defendant, argued, that after the invalidity of the conveyance to *Stephen* was declared by the Court, the notice to *Stephen*, even supposing it to be well served, would be unavailing, inasmuch as the creditors of *William*, and not *Stephen*, were the parties entitled to the surplus proceeds: the power of sale, therefore, had not arisen, and the sale could not be sustained. They contended also, that the title to the allotment, under the inclosure act, was dependent upon the title to the lands in respect of which it was allotted, and that, therefore, it was necessary, as a preliminary step, to identify the particular lands in respect of which the allotment was made, and shew that there was a good title to those lands in the party from whom the title to the allotment was derived: *Hodgkinson v. Cooper* (a).

Mr. *Malins* and Mr. *Welford*, for the Plaintiff.

Judgment.

VICE-CHANCELLOR:—

After disposing of other objections,—

With reference to the objection of the insufficiency of the notice, it was said, that after the decree in the

creditors' suit, declaring the conveyance to *Stephen* void as against the creditors of *William*, it was not enough that *Stephen Beasley* should be served, but that the creditors of *William Beasley*, in whose favor that decree was made, should also have been served. It is admitted that the mortgage to *Major*, and the power of sale contained in it, were unaffected by that decree. The position of the parties is, in fact, somewhat anomalous. The creditors of *William* claim, not under, but paramount to, *Stephen*. There is no privity between *William Beasley's* creditors, and *Stephen's*, and those who claim under *Stephen*. But the title of *Major*, who claims under *Stephen*, is paramount to that of the creditors of *William*. The creditors of *William* in such circumstances may have a right to redeem, and a right to require *Major* to account for the proceeds of the sale, but (not claiming under *Stephen*) they have no right to interfere with the power of sale vested in *Major*, and which his contract with *Stephen* gave him. Assuming, then, that *Stephen* was the only person to whom it was necessary that notice should be given,—was the act, done in the present case, sufficient?—I think it was. The power of sale in the mortgage deed made a notice left at the last known place of residence of *Stephen*, sufficient, and if *Stephen* left that place vacant, and the door closed, I think, as against him, which (in my view of the case) is the only question, affixing the notice on the door was sufficient, at least to throw the onus on the other side of shewing that something more should have been done, or why that which has been done is insufficient?

It was also argued, that evidence should have been given that *Stephen Beasley* was actually living, when notice was affixed on the door. Upon the facts which are before me I think not.—The common presumption

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is, that life continues; and there is no suggestion here, that any ground exists for supposing *Stephen* to have been dead.

The next ground of objection was, that the agreement for sale, being before the expiration of the period fixed by the notice, the sale was void.—I do not give any opinion how it would be, if an undervalue or any special circumstance were suggested, calculated to impeach the sale. But here the question is put in the abstract,—that a mortgagee with a power of sale may not,—a day before the power of sale is to arise,—make a conditional agreement with a purchaser that he shall have the estate at an agreed price, if the mortgagor do not redeem it. I cannot go the length of saying such an agreement is, *ipso facto*, void.

In 1784, a certain tenement and four acres, and one acre and a half of land dispersed in the common field of *A.* were conveyed to the party under whom the vendor claimed. In 1818, the devisee of the same party conveyed the tenement with an allotment of land described as containing three acres and one rood, allotted to the deviser under an act passed in 1801, for enclosing part of the parish of *A.*, in lieu of five acres of common field lands. The estate was contracted to be sold in 1841:—*Held*, that in the absence of any proof that the whole of the common lands in *A.* had not been allotted, or that any other allotment had been made to the same party, the Court would assume that the allotment had been made in substitution of the common lands comprised in the deed of 1784.

The next question is, with respect to the allotment. Now the allotment is not in respect of a right of common appurtenant to other lands. If so the title to the other lands would be material. But this is an allotment by way of substitution for four acres of lands in the common. If the title be good to the four acres for which substitution is made, the title to the substituted acres is good also. Now the title to the four acres and the one and a half acre would be clearly good by the effect of time. The theory on which the objection is founded, therefore, must be that the four acres, in respect of which the allotment was made, were other four acres than,—and not included in,—those in the deed of 1784. If upon inspection of the award, it appeared that the whole of the common-lands were not allotted,

or that any other allotment was made to *William Beasley*, a question might possibly have been raised on the point. But in the absence of some evidence to raise the question, I cannot presume, which in effect I am called upon to do,—that *William Beasley*, between the year 1784 and the time of the award, had parted with the common land which he had in the year 1784, and that the four acres, in respect of which the allotment was made, were not the same as those comprised in the deed of 1784. I think the objection cannot be sustained.

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LETTS v. THE LONDON AND BLACK-
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12th, 13th, &
30th January.

A bill for tithes, by the rector of *St. Olave, Hart Street*, in the city of *London*. The tithes were payable by or claimed from the defendants under the provisions of an act of Parliament (a), enabling them to remove cer-

An act for making a railway enabled the company to pull down the houses of a parish in the city, and pro-

vided for the indemnity of the rector in respect of his right to the tithes of 2s. 9d. in the pound on the removed buildings, by enacting that the company should pay the rector tithes in respect of the houses removed, according to the last assessment thereof to Lady-day preceding, equal to the loss sustained by the want of occupiers owing to such removal, until new houses or other buildings should be erected of such annual value that the tithes payable thereon should be equal to the tithes payable on the buildings removed, such payments to diminish in proportion to the yearly sums actually payable for tithes on the new buildings. The company pulled down houses, on some of which the tithes of 2s. 9d. in the pound were paid on the full annual value,—on others of which the same had been paid by agreement between the rector and the occupier, at less than the full annual value—and several on which the tithes had been wholly or partly remitted by the rector for the sake of harmony.

Held, that the rector was not, under the railway act, entitled to tithes from the company according to the value at which the property removed was assessed to the poor-rate.

That the rector was entitled to tithes from the company according to the annual value at which the property removed had been last fixed by agreement between the rector and the occupier.

That where no agreement was proved to have been made between the rector and occupier, the sum last collected as tithes should be taken as representing 2s. 9d. in the pound on the annual value of the buildings.

(a) 2 & 3 Vict. c. xciv., (August, 1839).

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tain dwelling-houses and buildings in the parish, for the purpose of making the railway. The houses which were taken down by the Defendants were subject to tithes, at the rate of 2s. 9d. in the pound, under the statute 37 Hen. 8, c. 12(a). The railway act (s. 33) for indemnifying the rectors of the several parishes of *Allhallows Barking*, *St Olave Hart Street*, and *Allhallows Staining, Mark Lane*, and the impropiators of the rectories and tithes of the parishes of *St. Botolph without Aldgate*, and *Allhallows Staining, Mark Lane*, their respective successors, heirs, and assigns, against such loss as might otherwise accrue to them respectively, by reason of taking down, or using for the purposes or under the powers of the act, any houses or other buildings in the said parishes, any or either of them, enacted, that, after the occupier or occupiers of any of the houses or other buildings to be taken down for the purposes or under the powers of the act, within the said parishes, any or either of them, should have quitted the possession thereof, in pursuance of the act, or in pursuance of any notice or notices to be given or left for that purpose, under the powers or provisions of the act, and in the meantime, and until new houses or other buildings should be erected, completed, and occupied on the ground which should be cleared under any of the provisions of the act, within the said parishes, any or either of them, or on some part thereof, of such an annual rent or value that the tithes, or yearly sums of money by way or in lieu of tithes, for the time being actually payable for such new houses or other buildings, should be fully equal to the tithes, or yearly sums of money by way or in lieu of tithes, payable for the houses or other buildings so for the time being quitted by the

(a) See 4 Hare, 172.

occupiers thereof, as aforesaid, within the said parishes, any or either of them,—the tithes or yearly sums of money, or customary payments in lieu of tithes payable in respect of the houses or other buildings within the said parishes, any or either of them, which should be so quitted, as aforesaid, (according to the last assessments thereof to the 25th day of March then last), or annual sums of money equal to the loss in tithes, or sums of money or customary payments in lieu of tithes, which the said rectors and impropriators, their respective successors, heirs, or assigns, might sustain by the want of occupiers in or by the taking down of such houses or other buildings respectively, estimated as aforesaid, should be paid and payable to the said several rectors and impropriators, their respective successors, heirs, and assigns, out of the monies to be applied for the purposes of the act, clear of all taxes and deductions, at the four most usual feasts or days of payment in every year (that is to say) the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, by equal payments in each year, the first payment thereof respectively to be made on such aforesaid feast days as should first and next happen after the occupier or occupiers of any of such houses or other buildings in the said parishes, any or either of them, should have quitted the same as aforesaid; and such sum and sums of money, to be paid and made good as aforesaid, should diminish in proportion to the tithes or yearly sums of money by way or in lieu of tithes, which should for the time being be actually payable for new houses or other buildings erected, completed, and occupied on ground which should be so cleared within the said parishes, any or either of them, as aforesaid.

The railway company cleared a space of ground in the parish, upon which there were upwards of thirty houses,

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which altogether were assessed to the poor-rate at the sum of £2978. The amount which had been received by the rector upon the houses so taken by the company had not been regulated by the assessment to the poor-rate, but by agreement or arrangement between the rector and the occupiers; the bill, however, alleged, that the assessment to the poor-rate had been usually resorted to in making such arrangement. Upon four houses in the parish, occupied or used by corporate or public bodies, the rector had received the tithes of 2s. 9d. in the pound at the full annual value: upon others of the houses, for the sake of harmony and good will, the rector had received less than the annual value, or, as he stated by his bill, had either wholly or partially remitted the payments due to him.

The bill prayed a declaration by the Court, that the Plaintiff and his successors were entitled to receive from the company, in respect of all the houses which they had so taken, tithes, or annual sums by way of tithes, after the rate of 2s. 9d. in the pound on the annual values of such premises, according to the last assessment up to the 25th of March, 1839, by agreement between the rector and occupier, or else according to the last assessment to the poor-rate up to the same time, such tithes or annual sums to commence from the quarter day next preceding the time when the premises were taken by the company, subject to the deduction of such sums as should be payable for tithes by the occupiers of the premises which were still left standing, and of a new house and part of a house which had been built, and of any other new houses or buildings which should at any future time be built and occupied upon the ground which had been cleared by the company. The bill prayed that an account might be

taken of the tithes according to such declaration, and that the company might be decreed to pay to the Plaintiff the amount which should be found due upon such account. And the bill also prayed that in case it should appear to the Court, that the railway warehouses and works constructed by the company on the ground so cleared, were tithable premises "erected, completed, and occupied," within the meaning of the act (2 & 3 Vict.), and that by such erection the annual compensation by the loss of tithes had been determined, then that it might be declared that the Plaintiff and his successors were entitled to tithes at 2s. 9d. in the pound on the annual value of such warehouses and works, and that an account might be taken, and payment made accordingly.

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There was a cross bill by the company against the rector.

Mr. Romilly and Mr. Prescott White, for the Plaintiff. *Argument.*

Mr. Wood and Mr. Bell, for the Company.

The arguments will sufficiently appear in the judgment. The case of *Vivian v. Cochrane (a)*, and several of the cases there cited were referred to, and also *M'Dougall v. Purrier (b)*.

VICE-CHANCELLOR:—

Having been requested by the counsel for both parties to state my opinion on the construction of this act, I will not refuse to do so; but I think it right in the

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(a) 4 Hare, 167.

(b) 4 Bligh, N. S. 433.

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first instance to state, that I am willing to give either party, if they now desire it, a case for the opinion of a court of law.

The Plaintiff is the rector of *St. Olave, Hart Street*, and the Defendants are the *Blackwall Railway Company*. By a decree passed in 1545, the Plaintiff is entitled to 2*s.* 9*d.* in the pound upon the annual value of all houses in the parish of *St. Olave, Hart Street*, in lieu of tithes. The Defendants, under the powers of their act, have purchased or taken thirty-three houses within the parish, and the question is, what payment they are bound to make to the rector in respect of those houses. The answer to this depends upon the construction of the 33rd section of the statute 2 & 3 Vict. c. xcv. [His Honor stated the words of the act.] The Plaintiff admits that he did not collect 2*s.* 9*d.* in the pound upon the annual value of any houses in the parish, except upon four occupied by corporate or public bodies, and that upon these four 2*s.* 9*d.* in the pound had been paid upon the annual value agreed upon between himself and the occupiers. The Plaintiff says, that, for the sake of harmony and good will between himself and his parishioners, he had remitted part of the 2*s.* 9*d.* in the pound upon the value, but that such remission was a voluntary act on his part, and not the result of a binding agreement, and he claims to be entitled to the full sum of 2*s.* 9*d.* The Defendants, on the other hand, insist, that the annual sum actually collected by the rector represents the assessments intended by the Legislature in the clause of the act, which has been mentioned.

The first question is, what is meant by the word "assessments?" And here it may be observed, that the

Plaintiff has not proved any assessment by agreement, except upon the four houses enumerated above, and four others, which I shall presently mention. On the part of the Plaintiff it has been argued, that the word "assessments" refers to the assessment for the relief of the poor, as a means of measuring the annual value, and that 2s. 9d. in the pound ought to be calculated upon that assessment, in the case of each house taken by the company. To that argument I cannot accede, unless there is nothing else in the nature of an assessment relating to the tithes, by which the word "assessments" in the act can reasonably be satisfied. Now it appears to me, that the act did not find the rights of the parties in this state, but, on the contrary, that there existed before and at the time this act of Parliament was passed, that which the legislature must have intended to describe by the word "assessments." The 2s. 9d. in the pound given by the decree of 1545 was a fixed quantity, and the charge to which each occupier was liable depended upon the annual value of his house, and when this value was determined by agreement or otherwise (for I do not rely on the fact of there having been agreements), but when the annual value of the house was determined by agreement or otherwise, as it must have been to enable the rector to claim anything, the amount of the charge so determined would answer the word "assessments" in the act of Parliament with sufficient accuracy to satisfy me, that I may adopt it as the meaning of the act,—and I should not be justified in saying, that because there happens to be an assessment to the relief of the poor, which may appear to be a convenient mode of ascertaining the value, that that was the assessment intended by the act.

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If there had existed in writing an agreed annual value of all the houses in the parish, and 2s. 9d. had been

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charged upon it, no one would, I think, question the conclusion I have come to, and so far I entertain no doubt. I do not, however, mean to say, that an agreement between the parties to take the poor-rate as an evidence of the actual value of the houses (if such agreement had existed) might not have been binding.

The next question is one of more difficulty. The collector is examined. The collector's books and also some receipts signed by him for the annual sums collected by him for the use of the rector are produced. It is proved in the cause (taking the evidence as credible) that, as to the four houses I have mentioned, 2s. 9d. in the pound was collected upon the agreed annual value of the houses. It is also proved in evidence, though not stated in the bill, that as to other four of the houses taken by the company, the rector and the occupiers had come to an agreement, which agreement was subsisting on Lady-day, 1839. An observation occurs upon this, which I will make in passing,—the bill alleges, that wherever there was a change of occupation, there was a new agreement come to between the parties. Upon the point as to these houses, it might have been a question, (I do not mean to decide it now), whether the Defendants might not be entitled to an inquiry. But the Defendants filed a cross bill against the Plaintiff, and the Plaintiff, in answer to that bill, specified these four houses, as houses upon which this agreement had been come to. There being a general allegation of this agreement, the evidence would be admissible under it; and as the cross bill has given the Defendants information as to these particular houses, it does not appear to me that the case is, in that respect, in any difficulty. Upon these four houses the collector says, that, by the direction of the rector, he collected less than 2s. 9d., and the same, according to

his evidence, is true with respect to all the other houses, except the four first adverted to, and except also the collector's own house, and the houses of very poor and indigent persons. He says that this was done to preserve harmony and good will in the parish, and that there was no agreement whatever between the rector and the occupiers, whereby the rector was precluded from demanding the full sum of 2*s.* 9*d.* in the pound. In each case the rector's books have been produced, and those books shew, that sums less than 2*s.* 9*d.* in the pound on the annual value were collected up to the time when the houses were taken by the company. The Defendants have contended, that the sums, appearing by the rector's books to have been demanded and paid, are to be taken as the "assessments" mentioned in the act. Now, with that argument I do not agree. Take the case of the houses, as to which the annual value was agreed upon. Why should not the rector be allowed to claim his 2*s.* 9*d.* in the pound upon those, as against the company: the agreement as to the annual value being proved,—the 2*s.* 9*d.* being given,—and the reason for remitting the difference being also proved?

I pointed out, during the progress of the cause, what appeared to me to be the difficulties of the Defendants' argument. If this part of their argument is sound, the defendants might build upon the ground less than the former number of houses, but of the same annual value, and might require the rector, according to the terms of the act, to exact the full sum of 2*s.* 9*d.* in the pound upon the annual value of the houses so built, and might tell him that his claim upon the company was satisfied so soon as the aggregate amount of 2*s.* 9*d.* to be exacted upon those newly built houses should equal the amount of the annual sums, (less

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than 2s. 9d. in the pound), to which, by reason of his indulgence, he had been in the habit of limiting his collections. Suppose, in order to explain this,—that one of those schemes which were at one time agitated for making a great central metropolitan station were to receive the sanction of the legislature, and that half this parish were to be taken: if the rector had been accustomed to take half his due on the houses removed, and the argument of the Defendants were to prevail, the consequence would be, that the railway company, having pulled down half the houses in the parish, might rebuild half as many houses as they had taken, but of the same annual value as the houses pulled down, and they might then tell the rector to charge his 2s. 9d. in the pound on a diminished number of houses, and exact his full due without indulgence or remission; and might contend that he was no sufferer, for arithmetically he would obtain the same annual income as he had been content, for the sake of preserving harmony with his parishioners, to take before.

I give entire credit to the collector's evidence on this point. It corresponds with the nature of the resistance which unfortunately is so often made to the claims of the clergy, and with the concessions which are so frequently made for the sake of harmony and good will. I should observe in confirmation of this view of the case, that the legislature in the long parenthetical clause commencing with the words, "and in the meantime," and ending "within the said parishes or any or either of them," and indeed the argument of the Defendants, treats the 2s. 9d. in the pound as the due of the rector in favour of the company, who may oblige him to exact that sum from others;—and yet, by the argument, I am now asked to reject that view in favour of the company on their interpretation of the word "assessments."

It does not appear to me, that the Defendants' interpretation of that word would answer the object of the legislature, which was to indemnify the rector against loss.

One other argument I have to notice on this part of the case. Certain receipts have been produced, signed by the collector, (who represented the rector), which were given by him to persons who had paid their tithes; these receipts purport to be for sums due; and if literal effect be given to the words, it would appear as if those were the sums assessed according to law, and that the rector was by agreement precluded from demanding more. In point of evidence these are mere printed receipts in a common form, and the argument founded upon them goes directly to contradict the testimony of the collector. It does not appear to me, that these receipts in a common form can be taken to countervail that evidence, which I see no ground to question.

As far as the case applies to the four houses, the value of which the collector says has been determined by agreement,—not deciding whether that evidence is satisfactory, until I know whether any inquiry upon the point is asked,—it appears to me that the Plaintiff has a right to have it considered that 2s. 9d. in the pound was the sum actually due on those houses. With respect to the other houses, as to which no annual value has been proved, I think I must, as to them, say that there has been no assessment, or I must presume that the sums actually collected represent the proper assessments. Looking at the evidence of the collector, I think I may take it that there was an agreed annual value,—that that agreed annual value cannot now be proved,—and that the sums actually collected must be taken for this purpose to be the sums

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due according to the agreement. Upon these several points the parties may, if they think proper, take a case for the opinion of a court of law.

Decree.

THIS Court doth declare, that the Rev. *John Letts*, the Plaintiff, &c., is entitled, subject to the deductions hereinafter mentioned, to be paid tithes after the rate of *2s. 9d.* in the pound on the annual values of houses and other buildings taken by the Defendants, the *London and Blackwall Railway Company*, as such annual values had been agreed on between the rector for the time being of the parish of *St. Olave, Hart Street*, in the city of *London*, and the respective occupiers, for the time last before Lady-day, 1839. And it is ordered, that it be referred to the Master, &c., to inquire and state, &c. what houses and other buildings have been taken by the Defendants, the *London and Blackwall Railway Company*, and the annual values thereof respectively, according to such last agreements aforesaid; and in case, as to any of the said houses and other buildings, no such agreement as aforesaid shall be proved to have been entered into, then, as to each of such last-mentioned houses and buildings, it is ordered, that the said Master do take the annual sum last collected by way of tithe thereon as representing two shillings and ninepence in the pound on the annual value thereof. And it is ordered, that the said Master do take an account of what is due to the Plaintiff from the said Defendants, the *London and Blackwall Railway Company*, for tithes, having regard to the declaration and inquiries aforesaid. And it is ordered, that the said Master do also take an account of all sums received by the said Plaintiff from the said Defendants, the *London and Blackwall Railway Company*, or any other persons, for tithes, in respect of any and which of the houses or buildings so taken as aforesaid, since they were so taken, or in respect of any and what new houses or other buildings erected by the said Defendants, the *London and Blackwall Railway Company*, on the site thereof. And it is ordered, that the said Master do deduct the amount of the sums so received from what he shall find due for tithes, and state the balance. And it is ordered, that the said Defendants, the *London and Blackwall Railway Company*, do pay such balance to the Plaintiff within fourteen days from the date of the said Master's report.

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MEMORANDA.

In July, 1846, Lord *Lyndhurst* resigned the Great Seal, which was thereupon delivered to Lord *Cottenham*.

At the same time Sir *Frederick Thesiger* resigned the office of Attorney-General, and Sir *Fitzroy Kelly* the office of Solicitor-General. The former was succeeded by Sir *Thomas Wilde*, and the latter by *John Jervis*, Esq., Patent of Precedence.

Soon afterwards died Sir *N. C. Tindal*, Chief Justice of the Common Pleas, whereupon Sir *Thomas Wilde*, Her Majesty's Attorney-General, was appointed Chief Justice of the Common Pleas. *John Jervis*, Esq., Her Majesty's Solicitor-General, was appointed Attorney-General, and *David Dundas*, Esq., one of Her Majesty's Counsel, was appointed Solicitor-General; and they shortly afterwards respectively received the honour of Knighthood.

In September, 1846, died Sir *John Williams*, one of the Judges of the Queen's Bench, whereupon Sir *William Erle*, one of the Judges of the Common Pleas, was appointed a Judge of the Queen's Bench, and *Edward Vaughan Williams*, Esq., one of Her Majesty's Counsel, was appointed a Judge of the Common Pleas, and afterwards received the honour of Knighthood.

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MEMORANDA.

In the Vacation after Trinity Term, 1846, Serjeant *Talfourd* and Serjeant *Manning* were appointed Queen's Serjeants; Serjeant *Murphy* and Serjeant *Byles* received patents of precedence; and *Joseph Humphry*, Esq., *James Bacon*, Esq., *Spencer Horatio Walpole*, Esq., and *John Rolt*, Esq., were appointed of Her Majesty's Counsel.

In Michaelmas Term, 1846, *Charles Buller*, Esq., was appointed of Her Majesty's Counsel.

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See JOINT STOCK COMPANY, 8, 12.

1. An act of Parliament, empowering commissioners to inclose the common lands in a certain township, reciting the titles of certain land-owners, and that it would be greatly for the advantage of the proprietors of the common lands that the same should be divided and inclosed, enacted, that it should be lawful for the commissioners to set out and make such ditches, water-courses, and bridges, of such extent and form, and in such situations, as they should deem necessary, in the lands to be inclosed; and also to enlarge, cleanse, or alter the course of and improve any of the existing ditches, water-courses, or bridges, as well in and on the same lands, as also in any ancient inclosures or other lands in the township, as they should deem necessary:

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—*Held*, that the act did not empower the commissioners to alter the drains in the common lands, so as to overload an ancient drain which flowed through the common lands from another township, and thereby to obstruct the drainage of the lands in such other township, to the damage and injury of the owners of such lands. *Dawson v. Paver*, 415

2. Where an act of Parliament empowers certain persons to deal with their own property, or with property in a certain place or district, or defined by a certain description, and does not, by express words, or by necessary implication, import that the Legislature intended to affect the rights of other persons in other property,—courts of law do not construe mere general words in the act as affecting the rights of strangers as to property not within the description of that with which the act expressly purports to deal. *Id.*

3. Whether an act of Parliament is to be deemed a public act, binding on all the Queen's subjects, or merely a private act, depends upon the nature and substance of the case, and not upon the technical consideration whether the act does or does not contain a clause declaring that it shall be deemed to be a public act. *Id.*

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ACTION.

See CREDITORS' SUIT.

ADMINISTRATION SUIT.

1. A party entitled to, or taking by assignment a legacy, or a share of a residuary estate, may institute a suit for the administration of such estate at any time before the complete administration of the assets, or before such legacy or residuary share is withdrawn from its position as assets unadministered, and constituted a trust fund applicable to the specific trusts of the will; but, *semble*, where the right is unnecessarily exercised, the Court may make the decree without costs. *Cafe v. Bent*, 24

2. In the administration of assets, a voluntary bond is to be preferred to interest upon debts not by law carrying interest, payable under the 46th Order of August, 1841. *Garrard v. Lord Dinorben*, 213

3. A creditor recovered judgment, and sued out a writ of fieri facias thereupon, in the lifetime of his debtor, and placed the writ in the hands of the sheriff on the day after the debtor died. A decree was afterwards made in the suit of an equitable mortgagee of certain parts of the real and personal estate of the debtor against his devisee and executor, for the sale of the mortgaged property, and if the proceeds of such sale should be insufficient to satisfy the Plaintiff's debt, *then* for an account and application of the general personal and real estate of the testator, in a due course of administration. After this decree the judgment-creditor levied, under the fieri facias, on goods left by the debtor. The executor thereupon moved for an injunction to restrain execution, which the Court refused on two grounds—first, because the decree for an account and administra-

tion of the general estate was not absolute, but was conditional on the mortgaged property proving insufficient to satisfy the Plaintiff's demand; and secondly, because the judgment-creditor acquired a right to the goods of the debtor, by virtue of the writ of fieri facias, from the teste of the writ, and therefore paramount to the right of the executor. *Ranken v. Harwood*; *Ranken v. Boulton*, 215

ADMISSION AND DISCHARGE.

1. *A.* transferred a sum of stock into the joint names of herself and *B.*, and then informed *B.* of the transfer, expressing her confidence that *B.* would fulfil the wishes which *A.* might express to her respecting the same. After the death of *A.*, her administratrix filed the bill against *B.* for the transfer of the stock as part of the personal estate of *A.* *B.*, by her answer, admitted the transfer of the stock into the joint names of *A.* and *B.*, and stated that *A.* afterwards, from time to time, told her (*B.*) what part of the stock and dividends should be transferred and paid to different persons, and, subject to such dispositions, desired her to hold the remainder for her own use; and *B.* also, by her answer, stated that she had, in pursuance of such directions, paid the several sums to the persons mentioned:—*Held*, that the Plaintiff, having read from the answer the admission of the transfer upon trust, was bound also to read, from the answer, the directions or declaration of *A.* as to the trusts upon which the fund was to be held and disposed of. *Freeman v. Tatham*, 329

2. That the Plaintiff ought not, in the circumstances of the case, to be allowed to withdraw that part of the answer which had been read. *Ib.*

3. That, as to *B.*'s statement of the

declaration of *A.*, that the residue should belong to *B.* herself, the Court would direct an issue, giving the Plaintiff an opportunity of examining *B.* thereon, as to the directions given to her by *A.* *Ib.*

4. That the Plaintiff was not bound to read the statement in the answer as to the fact of the payments to the other persons having been made; and that *B.* was bound to prove, by other evidence, the payments which she had made in pursuance of the trusts. *Ib.*

5. On an inquiry before the Master, the Plaintiff read from the answer and examination of the Defendant, the executor, an admission that a promissory note for 400*l.*, belonging to the testator, had come to the hands of the executor shortly after the testator's death; and the executor was then allowed to read the further statement, that some years afterwards, when the Plaintiff (the sole residuary legatee) came of age, he had delivered the note to the Plaintiff, who thanked him for taking care of it. *East v. East*, 343

ADOPTION OF CONTRACT.

See ANNUITY.

AFFIDAVIT OF SERVICE.

An affidavit of the service of an order of the Court, must state that such order was "duly passed and entered." *Willetts v. Willetts*, 597

AGENT.

See EXECUTOR DE SON TORT, 1, 2.

AGREEMENT.

See ANNUITY.

HUSBAND AND WIFE.

STATUTE OF FRAUDS, 29 Car. 2, c. 3, s. 4.

TITHES, 2, 3.

An agreement between *B.* and *C.*

was communicated by one of the parties to *A.*, after applications in writing from *A.* for the signature of the other parties to a memorandum expressing his interest as a partner in the transaction relating to the land, the subject of the agreement; and the Court held, that the agreement so communicated must be taken, not as an original proposal, but as an acknowledgment of a pre-existing right in *A.*; and that *A.* might avail himself of the acknowledgment, notwithstanding the agreement between *B.* and *C.* was *res inter alios acta*, and notwithstanding *A.* objected to some of the terms in that agreement, as not truly expressing his partnership contract. *Dale v. Hamilton*, 392

ALLOTMENT.

See COMMON LAND.

AMENDMENT.

See DEMURRER, 1.

An order made at the hearing, that the cause should stand over, with leave to amend by adding proper parties and apt words to charge them, or to shew that other parties are not necessary, or to file a supplemental bill,—does not entitle the Plaintiff to introduce by amendment any charge against the original Defendants, which is not necessary to explain the amendment. *Gibson v. Ingo*, 156

ANNUITY.

See ELECTION.

INTEREST OF LEGACY.

INVESTMENT.

The Plaintiff being entitled to an annuity of 300*l.* charged upon plantations in the *West Indies*, belonging to *K.*, entered (as agent for *K.*) into an agreement with *D.*, by which *D.*, in consideration of having the produce

consigned to him until his advances were satisfied, was to ship supplies to the plantations, and honour bills drawn upon him *D.* by *K.* for the expenses of management, and also to pay the Plaintiff's annuity. The consignments were made, and *D.* paid the Plaintiff's annuity for one year, and then discontinued the payment, although he received subsequent consignments. The bill prayed that *D.* might be ordered to pay the annuity so long as he continued to receive the consignments:—*Held*, on demurrer, that, without deciding whether the Plaintiff could (with reference to the decision in the case of *Garrard v. Lord Lauderdale*) sustain a suit to enforce the agreement as against *D.*, *D.* could not, after the payment of the annuity which he had made under the contract, withhold from the Plaintiff the benefit of the contract for the further payment of the annuity. *Kirwan v. Daniel*, 493

ANSWER.

See ADMISSION AND DISCHARGE, 1, 2, 4.
BANKRUPT, 1.

1. The Order XLIII. of May, 1845, which directs that commissions to take answers are to be made returnable without delay, does not preclude the answer from being filed, although delay may in fact have occurred. *Hughes v. Williams*, 211

2. Mode of altering and correcting the title of an answer, which purports to be the answer of several Defendants, where such answer has been sworn by some of such Defendants, but the others refuse to join in it. *Thatcher v. Lambert*, 228

3. On the dismissal of a bill with costs, the Court referred it to the Master to inquire and state whether it was necessary or proper that several Defendants, consisting of trus-

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tees and their cestui que trusts, appearing by the same solicitor, and having no conflicting interests, should have filed two separate answers to the bill. *Woods v. Woods*, 229

APPEAL.

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See BANKRUPT, 1, 2.

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AWARD.

1. The submission to arbitration may, under the statute 9 & 10 Will. 3 c. 15, be made a rule of court, not only after the award has been made, but after the last day of the term following the publication of the award; and when, therefore, it is no longer open to either party to complain of the award on the ground of corruption or undue practice. *Heming v. Swinnerton*, 350

2. An objection to the validity of an award, apparent upon the award, is not an objection to making the submission a rule of court under the statute. *Ib.*

3. A motion to make a submission to arbitration a rule of court under the statute, may be made ex parte. *Semble. Ib.*

4. Commissioners appointed under an act of Parliament, to set out the metes and bounds of mines and quarries in the *Forest of Dean*, and to fix the rent to be paid for the same, *held*, under the terms of the act, to have no power to compel a miner to pay, in money, for by-gone workings, or to exclude him from the award if he refused to make such payment. *Attorney-General v. Jackson*, 355

5. Commissioners appointed by an act of Parliament, to determine the respective rights of the Crown and the customary miners on Crown lands, had made an award, giving a benefit to a miner, but had required such miner to submit to terms which they had no power to impose, and which the miner did not afterwards fulfil:—*Held*, that, after the time limited by the act for making the award had expired, the Court would not set aside the award at the suit of the Crown,

as it could not then restore the miner to his rights under the act. *Ib.*

6. In the case of an award made upon the faith of a parol contract, entered into by a party taking a benefit under the award, that such party would pay a sum of money to the Crown, an information by the Crown seeking specific performance of the parol contract, and thereby, in effect, to add the parol agreement to the award,—cannot be sustained. *Ib.*

7. *Semble*—The refusal to pay a sum of money according to an agreement, upon the faith of which an award was made, although it was a stipulation which the commissioners making the award were not empowered to insist upon,—would be a ground upon which in equity the party to whom the monies were to have been paid might resist the performance of the award, if the other party had sought the aid of the Court to enforce it. *Id.*, 365

BANKRUPT.

See INTERPLEADER.

STATUTE, 13 ELIZ. c. 5.

1. Where a Defendant becomes bankrupt before he has answered the bill, and a supplemental bill is filed by the Plaintiff against the assignees of the bankrupt Defendant, stating the bankruptcy, it is not proper for the Plaintiff, after filing such supplemental bill, to issue process to compel the bankrupt himself to answer the original bill. It is the same where both the Plaintiff and Defendant become bankrupt before the Defendant has answered the bill, and the supplemental bill is filed by the assignees of the Plaintiff against the assignees of the Defendant. The clerk of record and writs will, in such cases, give the usual certificate for setting down the cause, without any answer from the bankrupt being

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on the file. *Robertson v. Southgate*,
223

2. Where a Defendant becomes bankrupt after the institution of the suit, and his assignees are made parties by supplemental bill, it is not necessary to bring the bankrupt to the hearing, by serving him with the subpoena to hear judgment. *Stahlschmidt v. Lett*,
595

BILL OF EXCHANGE.

The acceptor of a bill of exchange, who had by the hands of the drawer as his agent paid the amount of the bill after it became due, to an indorsee for value, without procuring it to be delivered up, filed his bill against such indorsee for value and a subsequent indorsee, charging that the indorsee to whom the payment had been made had afterwards indorsed the bill to the other Defendant, without consideration, in order to recover the money from the Plaintiff a second time, and praying that an action commenced against him for the amount might be restrained, and the bill delivered up to be cancelled. Demurrer,—for want of the drawer as a party to the suit overruled. *Earle v. Holt*, 180

BREACH OF COVENANT AFTER DEATH OF COVENANTOR.

See COVENANT, 1, 2, 3.

BREACH OF INJUNCTION.

See INJUNCTION, 1, 2.

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See COVENANT, 1.

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CHARITABLE USE.

A bequest to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain, *held* to be valid so far as related to the pure personalty, but void in respect of the personalty savouring of realty. *Nightingale v. Goulburn*,
484

CHARITY ESTATE.

The proper form of suit to administer the funds of a charity is the information of the Attorney-General; but the trustees may file a bill against the Attorney-General to have the accounts of the charity taken, and to be personally discharged from liability in respect thereof, submitting to such account as the Attorney-General would be entitled to ask against them in an information; and in the same suit, if the Attorney-General desires it, the Court will direct a reference for a scheme. *The Governors of Christ's Hospital v. Attorney-General*,
257

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See ANSWER, 1.

COMMON LANDS.

In 1784 a certain tenement and four acres and one acre and a half of land dispersed in the common field of *A.*, were conveyed to the party under whom the vendor claimed. In 1818 the devisee of the same party conveyed the tenement with an allotment of land described as containing three acres and one rood allotted to the devisor, under an act passed in 1801 for enclosing part of the parish of *A.*, in lieu of five acres of common field lands. The estate was contracted to be sold in 1841:—*Held*, that in the absence of any proof that the whole of the common lands in *A.* had not been allotted, or that any other allotment had been made to the same party, the Court would assume that the allotment had been made in substitution of the common lands comprised in the deed of 1784. *Major v. Ward*, 598

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TENANT FOR LIFE AND RE-
MAINDERMAN, 2.

1. The testator appointed *A.*, *B.*, and *C.* executors and trustees of his will, providing, that if either of them, or any succeeding trustee or trustees, should die, or refuse or neglect or become incapable to act in the trust, it should be lawful to and for the survivor of them, the said *A.*, *B.*, and *C.*, and such new trustee or trustees to be nominated in their or either of their stead, to appoint a new trustee or new trustees instead of the said *A.*, *B.*, and *C.*, or either of them, or any future trustee or trustees so dying, or desiring to be discharged, or refusing or neglecting or becoming incapable to act as aforesaid. *A.* having disclaimed the trust, and *B.* having died, *C.* alone (though not the survivor of *A.*, *B.*, and *C.*) appointed new trustees under the power:—*Held*, that the new trustees were well appointed. *Cafe v. Bent*, 24

2. Bequest of 100*l.* each to the two children of the testator's nephews, *A.* and *B.*; *A.* had three children, and *B.* two children:—*Held*, that the five children, who were living at the date of the will and at the death of the testator, were entitled, under the bequest, to 100*l.* a piece. *Morrison v. Martin*, 507

3. Legacy to *Anne*, the wife of *Peter*, for life, remainder to *Peter*, the husband, for his life, and, after the death of the husband and wife, upon trust to pay the interest for the maintenance of such children of *Anne* as should be living at her death, until

they should respectively attain twenty-one, and when and as they should severally and respectively attain their said ages of twenty-one years, upon trust to pay and transfer the legacy equally unto and amongst all the children of *Anne*, when and as they should severally and respectively attain their said ages of twenty-one years; and, if any of the said children should die under twenty-one, then unto such as should attain that age, share and share alike; and, in case all and every of the said children should die under age, then to pay the legacy to the testator's next of kin. The children of *Anne*, who attained twenty-one years of age, acquired vested interests in the legacy, notwithstanding such children died in the lifetime of *Anne*, the tenant for life. *Bradley v. Barlow*, 589

CONTINGENT REMAINDER.

A devise of real estate to the use of *A.* for life, with remainder to the use of all and every the child or children of *A.* who shall attain the age of twenty-one years, and for want of such issue, over,—creates a tenancy for life in *A.*, with a contingent remainder in fee to such of the children of *A.* as shall attain twenty-one; and on the death of *A.*, leaving infant children, but having had no child who had then attained twenty-one, the interest of the children of *A.* was divested and the limitations over were defeated. *Festing v. Allen*, 573

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CONVERSION.

See TENANT FOR LIFE AND REMAINDERMAN, 1.

1. A direction to sell particular parts of the testator's personal estate is not of much weight on the question of the conversion of the residue; for the rule as to conversion does not proceed on the presumed existence of a definite intention that the property shall be converted, but upon the expressed intention that the legatees shall enjoy the property in succession. *Cafe v. Bent*, 34

2. The direction, that the trustees should retain a percentage on the rents to be collected, fortified by other expressions in the will, regarded as evidence that the testator contemplated the enjoyment of the leasehold property *in specie* by the legatees. *Id.*, 36

CONVERSION OF LOAN NOTES INTO SHARES.

See JOINT STOCK COMPANY, 8, 9, 10, 11.

COPIES OF THE BILL.

See PARTIES, 1.

CO-PLAINTIFFS.

If several co-plaintiffs allege by their bill that they are jointly, or in some joint character, entitled to the subject of the suit, and one or more of them would be so entitled, if, in this respect, the others or other of them were not, (no issue being joined on the question of the title, if any, being joint,) it is not necessary for the Plaintiffs, as between themselves, to prove in the cause, as against the Defendant, that their right, if any, is a joint right. *Blair v. Bromley*, 554

COPYHOLD.

Devise of a copyhold estate to three trustees, upon trust to permit *A.* to occupy the same or receive the rents and profits thereof for his life; and after the death of *A.*, upon trust to sell the estate and divide the proceeds amongst the children of *A.*; and gift of the testator's residuary estate to the trustees upon other trusts, but charged with debts and "the costs and charges of proving and executing" the will:—*Held*, that the fines payable on the admission of the devisees in trust to the copyhold estate were not part of the costs and charges of executing the will to be borne by the residuary estate, but that such expenses of admission were a charge upon the copyhold estate so devised. *Cole v. Jealous*, 51

COPYHOLDER.

See COVENANT, 4, 5.

COSTS.

See ADMINISTRATION SUIT, 1.
COVENANT, 3.
CREDITORS' SUIT.
DISMISSAL OF BILL, 1, 2.
DOWER.
GENERAL ORDER CXXII., of May, 1845.
MORTGAGOR AND MORTGAGEE, 3.
MOTION.
PLAINTIFF.
SEQUESTRATION.
STAT. 8 & 9 VICT. c. 18.
VENDOR AND PURCHASER, 1.

COSTS OF ADMITTANCE.

See COPYHOLD.

COURT OF BANKRUPTCY.

See INSOLVENT DEBTOR, 1.

COVENANT.

A lessor covenanted with his lessee for quiet enjoyment of the demised premises, and afterwards devised his real estate, subject to and charged with the payment of his debts. After the death of the lessor, the lessee was evicted, and brought his action of covenant against the executors of the lessor, who pleaded plene administravit; whereupon the lessee took out judgment of assets quando, &c., and procured the damages to be assessed upon a writ of inquiry. He then filed his bill against the devisees of the lessor, for satisfaction of the damages and costs out of the real estate of the lessor devised by his will:—*Held*, that, although damages recovered in an action of covenant, brought in respect of breaches of covenant happening after the death of the testator, were not a debt within the statute of fraudulent devises, (3 & 4 Will. & M. c. 14), yet they were a debt payable out of the real estate of the testator, under the charge of debts thereon created by his will. *Morse v. Tucker*, 79

2. That the devisees were not bound by the action brought, or the inquiry as to damages had against the executors, but were entitled to have the question of the liability of the estate of the testator on the covenant tried in an action defended by the devisees themselves. *Id.*

3. The lessee having recovered damages upon the covenant in the action directed by the Court, to which the devisees were parties, was held entitled, as against the devisees, to the amount of such damages,—to his costs of the ejectment,—of the action brought against the executors,—of the action on the covenant to which the devisees were parties,—and of the suit, and also to interest on the damages and costs, to be computed from

the time the amount was ascertained and judgment entered up in the action to which the devisees were parties. *Ib.*

4. A copyholder agreed to demise a tenement within the manor for sixty-three years on a building lease, and, as the custom did not allow a lease to be made for more than twenty-one years, the copyholder agreed to execute a lease for twenty-one years, with a covenant, for himself, his heirs and assigns, to renew the lease for a further term of twenty-one years at the expiration of the first, and for a further term of twenty-one years at the expiration of the second term. The copyholder died before the lease was executed, having devised the premises to a trustee:—*Held*, on a bill by the lessee against the trustee for specific performance, that the trustee, having no beneficial interest in the estate, was not bound in the lease for twenty-one years to enter into any covenant for the renewal of the lease at the expiration of that term, and that he could only be required to covenant against his own acts. *Worley v. Frampton*, 560

5. Whether, if the trustee had brought his bill for specific performance against the lessee, the lessee would have been compelled to perform the contract if the trustee had declined to covenant for renewal—*quære?* *Ib.*

CREDITORS.

See PARTIES, 1.

STATUTE, 13 Eliz. c. 5.

CREDITORS' SUIT.

See STATUTE, 1 W. 4, c. 60.

In a creditor's suit the Plaintiff did not establish his debt at the hearing; but the Court retained the bill, giving him liberty to bring an action. He produced other evidence, and recovered in the action. Decree for pay-

DEFENDANTS.

ment of the debt, and costs in equity, but no costs given of the proceedings at law. *Gregson v. Booth*, 536

CROSS SUIT.

See SECURITY FOR COSTS.

DAMAGES.

See COVENANT, 1, 2, 3.

DEATH OF DEVISEE OR LEGATEE BEFORE TESTATOR.

See STATUTE OF WILLS, 7 W. 4 & 1 V. c. 26, s. 33, 2.

DEBT.

See SET-OFF.

DEBTOR AND CREDITOR.

See ADMINISTRATION SUIT, 2, 3.

DECLARATION.

See STATUTE, 1 W. 4, c. 60, 2.

DECLARATION OF TRUST.

See ADMISSION AND DISCHARGE, 1, 3.

DECREE.

See EVIDENCE, 2.

OCCUPATION RENT.

PRIORITY OF INCUMBRANCERS, 8.
STATUTE, 1 W. 4, c. 60, 2.

DEFEAT OF LIMITATIONS OVER.

See CONTINGENT REMAINDER.
REMOTENESS.

DEFECTIVE INFORMATION.

See EQUITABLE JURISDICTION, 1.

DEFENDANTS.

See AMENDMENT.
ANSWER.

DEPOSIT OF TITLE DEEDS.

DEFENDANTS OUT OF THE JURISDICTION.

See REHEARING.

DELIVERY UP OF DEED.

See PRIORITY OF INCUMBRANCERS, 8.

DEMURRER.

1. Where the defendant omitted to give the Plaintiff notice at the proper time that a demurrer to the bill had been filed, and the Plaintiff irregularly obtained an order as of course to amend his bill, on or before a certain day, which order he obtained after twelve days from the filing of the demurrer, but within twelve days from the time he received the notice, the Vice-Chancellor, on a special motion (made after the expiration of the former order), restored the bill, and gave the Plaintiff leave to amend; but the Lord Chancellor, on appeal, discharged the order. *Matthews v. Chester*, 207

2. To a vendor's bill for specific performance of a contract to purchase shares in mines, insisting that the Plaintiff was not bound to give other evidence of his title to the shares than attested extracts from the cost-books or registers of the mines, and that the Defendant had refused to accept such evidence, but not alleging that the Plaintiff was unable to give other evidence of his title,—the Defendant demurred:—*Held*, that, as the Plaintiff was not precluded from giving other evidence of his title if necessary, the demurrer must be overruled. *Curling v. Flight*, 242

DEPOSIT OF TITLE DEEDS.

See PRIORITY OF INCUMBRANCERS, 3, 4, 7.

DISPAUPERING. 629

DEVISE.

See CONTINGENT REMAINDER.
REMOTENESS.

DEVISEE AND EXECUTOR.

See COVENANT, 2.

DEVISEE OR TRUSTEE.

See STATUTE OF LIMITATION, 3 & 4
W. 4, c. 27, s. 25.

DIRECTORS.

See JOINT STOCK COMPANY, 1, 3.

DISCRETION OF TRUSTEES.

See FINES ON REMOVAL, 3, 5.
INVESTMENT.

DISMISSAL OF BILL.

1. Order, on the application of the Plaintiff, to dismiss his bill, with costs, against disclaiming Defendants, without prejudice to any question how the costs should ultimately be borne. *Bailey v. Lambert*, 178

2. Notice of motion by one of two Defendants to dismiss the bill for want of prosecution. The Plaintiff thereupon filed a replication to the answer of that Defendant; the other Defendant had not appeared. On the motion being made, the Plaintiff undertook to dismiss the bill against the other Defendant, whereupon the Court refused the motion, but ordered the costs to be paid by the Plaintiff. *Heanley v. Abraham*, 214

3. Pending a reference of title, ordered upon motion, in a suit for specific performance, the Defendant cannot, under the 114th Order of May, 1845, dismiss the bill for want of prosecution. *Collins v. Greaves*, 596

DISPAUPERING.

It appearing on affidavits that a pauper Defendant was entitled to pro-

perty exceeding 20*l.* in value, the Court on motion ordered him to be dispaupered. *Goldsmith v. Goldsmith*, 125

DISSOLUTION.

See PARTNERSHIP, 4, 6.

DIVESTING OF INTEREST.

See CONTINGENT REMAINDER.

DIVORCE.

See HUSBAND AND WIFE, 2.

DOWER.

See ELECTION.

1. Bill for dower. The Defendants in possession denied the title of the widow, alleging that her husband had not been seised of an estate of inheritance in the premises; that allegation being founded on information as to the time of his death, which was believed to be correct, but afterwards found to be erroneous. Decree for dower and arrears for six years before the filing of the bill, but without costs. *Bamford v. Bamford*, 203

2. *Semble*, If the defence to a bill for dower be groundless, or founded on facts which the Defendant knew or with reasonable diligence might have known to be untrue, the decree would be with costs. *Ib.*

EFFECT OF A GIVEN ACT.

See INJUNCTION, 1.

ELECTION.

See HERITABLE BOND.

The testator by his will devised and bequeathed all his real and personal estate to trustees, subject to debts, &c., upon trust by and out of the rents, issues, and profits thereof, to pay an annuity of 100*l.* to his wife

EQUITABLE JURISDICTION.

during her life or widowhood, and subject thereto, upon trust for his daughter for life, with remainder to her children, remainder to his brother. And the testator empowered his trustees, at their discretion, during the continuance of the trusts and notwithstanding the same, to continue and carry on all or any of the farms or other concerns in which he might be engaged at the time of his decease, and to restrict or increase any such concern, and to demise, mortgage, or sell all or any part of his real estate or chattels real:—*Held*, that the widow was not entitled both to the annuity given to her by the will and to her dower out of the real estate. *Lowes v. Lowes*, 501

ENTRY ON LAND.

See STAT. 8 & 9 VICT. C. 18. (LAND CLAUSES CONSOLIDATION ACT).

EQUITY FOR A SETTLEMENT.

See HUSBAND AND WIFE, 1.

EQUITABLE JURISDICTION.

See AWARD, 5, 7.

MISTAKE OF PRACTICE AT LAW.

PARTNERSHIP, 7.

1. The mere fact, that a party having a power by deed to revoke and make a new appointment of trust funds, has attempted to make such revocation and new appointment by will, owing to her having forgotten the restrictions of the power, and being at the time unable to procure the deeds,—is not a ground upon which equity will supply the formal execution required by the terms of the power, or give to the will the effect of a deed, or convert the trustees of the property into trustees for the persons who would be appointees, if the

will were a good execution of the power. *Buckell v. Blenkhorn*, 131

2. A court of equity will declare and give effect to a forfeiture, where such forfeiture is incidental to the administration of a trust. *Duncombe v. Levy*, 232

EQUITABLE MORTGAGE.

See PRIORITY OF INCUMBRANCERS, 3, 4.

EQUITABLE MORTGAGEE.

An equitable mortgage by deposit of title-deeds, with an agreement in writing by the party making the deposit, to execute a formal mortgage of the property to the mortgagee for the balance which might be due to him, constitutes the equitable mortgage a purchaser for good consideration within the stat. 27 Eliz. c. 4, in respect of such balance; and, it being a term of the agreement that the mortgage to be executed should contain a power of sale, the Court, on a bill to set aside a prior voluntary conveyance by the mortgagor, as fraudulent and void, under the stat. 27 Eliz. c. 4, decreed, that, on default of payment, the mortgaged property should be sold. *Lister v. Turner*, 281

ERASURE IN PENCIL.

See REVOCATION.

EVIDENCE.

See ADMISSION AND DISCHARGE, 1, 2, 4, 5.

AGREEMENT.

CREDITORS' SUIT.

EXCEPTIONS.

VENDOR AND PURCHASER, 1, 6.

1. Where the issue raised by the bill and answer was, whether the Plaintiff had or had not signed a document under the representation and belief that it was an authority to another to receive the Plaintiff's rents, when it was in fact a contract for the

sale of his estate—evidence of the value of the estate cannot be regarded as shewing that, if a purchase, it was a purchase from a distressed man at an undervalue, but can only be regarded as bearing on the probability or improbability of the alleged sale. *Preston v. Wilson*, 194

2. Evidence received at the hearing of the cause, and entered in the decree, is not necessarily admissible as against all parties, on inquiries before the Master, under the decree. *Handford v. Handford*, 212

3. An order ex-parte may be obtained by a Defendant for leave to examine a Co-defendant, saving just exceptions,—as well after the decree, as before the hearing; and the question of the competency of the witness will not be tried upon motion to discharge the order, but is open when his evidence is tendered. *Steed v. Oliver*, 492

EXAMINATION.

See ADMISSION AND DISCHARGE, 5.
CO-DEFENDANT.

EXCEPTIONS.

The Master in his report stated, that he had admitted certain evidence, and that thereupon he found certain facts. A party objecting to the admission of the evidence, and to the conclusion thereupon, cannot open that objection as appearing on the face of the report, without having taken exceptions. *East v. East*, 347

EXECUTION.

See ADMINISTRATION SUIT, 3.

EXECUTOR.

See ADMINISTRATION SUIT, 3.

ADMISSION AND DISCHARGE, 5.
PARTNERSHIP, 3, 4.

TRUSTEE AND CESTUI QUE
TRUST, 2, 3.

EXECUTOR DE SON TORT.

1. The widow of the testator employed *A.* to collect some of the debts due to the testator's estate, which *A.* accordingly collected, and paid over to the widow, believing that she was the administratrix. The widow subsequently died without having obtained letters of administration:—*Held*, that *A.* having received monies which he knew to be part of the estate of the testator, and not having accounted for such monies to the legal personal representative of the testator, *A.* was liable to be sued as executor de son tort. *Sharland v. Mildon, Sharland v. Loosemore*, 469

2. That the liability was not avoided by the suggestion that *A.* acted as the agent of the widow, inasmuch as the acts of the widow and *A.*, in reference to the testator's estate, were the acts of wrong doers, and the law does not recognise the relation of principal and agent as existing amongst wrong doers. *Id.*

3. That *A.* was liable as executor de son tort to account to a party interested in the testator's estate, in a suit for that purpose, without any charge of collusion between such executor de son tort and the legal personal representative. *Id.*

FALSE RECITAL OF INCUMBRANCE.

See PRIORITY OF INCUMBRANCERS, 7, 8.

FINES.

See COPYHOLD.

FINES ON RENEWAL.

On a devise of successive interests in leases for lives or years, where the testator directs that the leases are from time to time to be renewed, without more, the fines and expense of renewal are to be borne by the

tenant for life and remainderman, or parties successively entitled, in proportion to their actual enjoyment of the estate, and not in proportion to an extent of enjoyment to be determined speculatively, or by a calculation of probabilities. *Jones v. Jones*, 440

2. There is no difference in the rule as to the apportionment of fines for renewal between the devisees of successive interests in the estate, whether the leases are for lives or for years. *Id.*

3. If the testator provides a specific fund for the renewals, or directs that the renewals shall be raised or borne by the parties in a certain manner, or in certain proportions, such direction supersedes the general rule; but if trustees, having power to direct the manner in which the fines shall be raised, do not exercise the power, the Court will pursue the general rule which would be adopted in the absence of any direction as to the manner of providing for the fines.

4. Whether there is any difference in the rule of apportionment in cases where the parties take successive interests under wills, and in cases where such interests are taken under settlements by deed—*quære*. *Id.*

5. Whether trustees, having power to raise the fines out of the rents and profits, or by mortgage, or otherwise, as they should think fit, might so act as to throw the burden on the parties, in proportions different from those in which it would be distributed by the general rule of the Court—*quære*. *Id.*

6. Where the tenant for life pays the whole fine on renewal, he will have a lien on the estate for the proportion which shall ultimately appear to be chargeable on the remainderman, or parties entitled in succession; and where the remainderman renews, or the renewal is effected by means of a mortgage of the estate, the tenant for

life may be required to give security to the remainderman for a proportionate part of the fine, calculated upon the assumed duration of the life interest; and if that interest should endure longer than such assumed period, he may be required to give further security, without prejudice in either case to the actual amount which, at the determination of his interest, shall appear to be his due proportion of the fine. *Id.*, 465

FORECLOSURE.

See PRIORITY OF INCUMBRANCERS, 3, 6, 8.

FOREIGN FUNDS.

See INVESTMENT.

FORFEITURE.

See EQUITABLE JURISDICTION, 2.

FRAUD.

See PARTNERSHIP, 6, 7.

FRAUDULENT CONVEYANCE.

See STAT. 13 ELIZ. . c5.

GENERAL ORDERS.

V. of the 9th May, 1839.

See PRELIMINARY INQUIRIES.

XXIII. August, 1841.

See PARTIES, 1.

XXX. *Id.*

See PARTIES, 3.

XXX. *Id.*

In a suit since the 30th Order of August, 1841, to establish the claims of creditors of a testator against his real estate devised, legatees, whose legacies are charged on such real es-

tate, are not necessary parties, where they are devisees in trust, having the powers specified in the Order. *Ward v. Bassett*, 179

XLVI. *Id.*

See ADMINISTRATION SUIT, 2.

XXIII. of 26th October, 1842.

See DEMURRER, 1.

XIII. of May, 1845.

See DEMURRER, 1.

XLIII. *Id.*

See ANSWER, 1.

XLVI. *Id.*

See DEMURRER, 1.

XCIII. *Id.*

See DISMISSAL OF BILL, 2.

CXIV. s. 4. *Id.*

See DISMISSAL OF BILL, 3.

CXXII. *Id.*

Reference to the Master, under the 122nd Order of May, 1845, to distinguish the parts of a cross bill which were of unnecessary length, and to ascertain the costs thereby occasioned. *Woods v. Woods*, 229

GENERAL WORDS.

See ACT OF PARLIAMENT, 1, 2.

GREAT BRITAIN — LEGACY FOR THE BENEFIT AND ADVANTAGE OF

See CHARITABLE USE.

HEARING.

See AMENDMENT.
CREDITORS' SUIT.
EVIDENCE, 2.

HEIR AT LAW AND RESIDUARY LEGATEE.

See HERITABLE BOND.

HERITABLE BOND.

The testator, who was a Scotchman, domiciled in England, devised all the rest and residue of his real, personal, and mixed estates and effects, whatsoever and wheresoever, which he might be seised or possessed of or entitled to at the time of his decease, upon trust for his children, in certain shares. One of the children being the heir-at-law of the testator, became entitled, according to the law of Scotland, to a heritable bond made by a debtor of the testator, after the date of the will, and given as a security for a debt, which was owing to him at the time the will was made:—*Held*, that the heir was not a trustee of the heritable bond for the executors of the testator, and that he was not bound to elect between the heritable bond and the benefits to which he was entitled under the will. *Allen v. Anderson*, 163

HUSBAND AND WIFE.

See SET-OFF.

1. A married woman entitled to a legacy, appeared by her counsel at the hearing of the cause, and claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband and wife. The husband was a bankrupt, and his assignee sold his interest in the legacy. The solicitors for the purchaser and for the wife agreed to refer the claim of the wife to their counsel; and the counsel determined that she was entitled to a settlement of the moiety, subject to the costs. Before any further steps were taken, the wife died, leaving children:—*Held*, that the husband and those claiming under him were, by the

steps which had been taken, bound to allow a settlement of part of the fund upon the wife and children; and that, upon the death of the wife, the children were entitled to the portion which would have been settled. *Lloyd v. Mason*, 149

2. Whether an ante-nuptial contract, whereby the intended husband agreed to secure to the intended wife an annuity for her separate maintenance, in the event of his death, or any separation taking place between them during their lives, is void; and if not, whether such contract is valid so far as it is intended to secure an annuity to the wife in case of a separation or divorce for any cause; or whether it is valid to the extent of securing the annuity to the wife in case of desertion by the husband, or divorce without misconduct on the part of the wife; or whether it is valid only to the extent of securing the annuity to the wife in the event of her surviving the husband—*quære*. *Cocksedge v. Cocksedge*, 397

3. Injunction, restraining the husband from interfering or intermeddling with, or continuing in possession of a house and furniture settled to the separate use of the wife. *Green v. Green*, 400 n.

INCLOSURE.

See COMMON LANDS.

INCOME OF RESIDUARY ESTATE.

See TENANT FOR LIFE AND REMAINDERMAN, 1.

INCLOSURE ACT.

See ACT OF PARLIAMENT, 1.

INDEFINITE ACTS.

See INJUNCTION, 1.

INQUIRIES.

INDEMNITY.

See MORTGAGOR AND MORTGAGEE,
1, 2, 3.

SPECIFIC PERFORMANCE.

INFANCY.

See HUSBAND AND WIFE, 2.

INJUNCTION.

See ADMINISTRATION SUIT, 3.

BILL OF EXCHANGE.

HUSBAND AND WIFE, 3.

MISTAKE OF PRACTICE AT LAW.

STAT. 8 & 9 VICT. c. 18, (LAND
CLAUSES CONSOLIDATION
ACT).

1. After an injunction had been granted, restraining a Defendant from permitting a certain injurious effect to be produced by a given cause, (but not otherwise restraining any definite act), the apprehended injury took place, but the Defendants denied, to the best of their belief, that it arose from the alleged cause; and the Court, in such circumstances, refused to treat the Defendants as contumacious, until it should have been conclusively determined by a verdict at law, that the injury complained of was produced by the cause assigned. *Dawson v. Paver*, 424

2. The verdict of a jury on the trial of one issue had found that the forbidden cause would produce the effect, but inasmuch as a new trial of the issue had been directed, the Court would not treat the verdict of the jury, on the first trial, as sufficient evidence to connect the cause with the effect, for the purpose of proceeding as upon a breach of the injunction. *Ib.*

INQUIRIES.

See EVIDENCE, 2.

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INSOLVENT DEBTOR. 635

INSOLVENT COURT.

See MORTGAGOR AND MORTGAGEE, 6.

INSOLVENT DEBTOR.

See MORTGAGOR AND MORTGAGEE, 6.

VENDOR AND PURCHASER, 1.

1. The Plaintiff filed his petition in the Court of Bankruptcy under the provisions of the Act 5 & 6 Vict. c. 116, for the relief of insolvent debtors not owing more than £300, and passed his examination, and obtained his interim and final orders for protection. He then filed an affidavit in the Court of Bankruptcy, stating that he had satisfied, and obtained a discharge from, all the creditors named in his schedule; and that he had notified such satisfaction and discharge by public advertisement. The Plaintiff then applied to the official assignee for a release of his estate, which, according to the provisions of the act, vested in such assignee on the presentation of the petition; but in the absence of any proviso in the act for determining the duties of the official assignee in such a case, the Plaintiff was unable to obtain any release or reconveyance. The Plaintiff then filed his bill against the Defendant, as mortgagee, for the redemption of an estate, which had been mortgaged before he presented his petition to the Court of Bankruptcy. Upon the objection of the Defendant, that the estate of the Plaintiff (if any) was vested in the official assignee:—*Held*, that, in the absence of any statutory jurisdiction on the subject in the Court of Bankruptcy, and upon the submission of the assignee, the Plaintiff was entitled to sustain the suit at the hearing. *Preston v. Wilson*, 185

2. Whether, if the Defendant had demurred, the bill would have been sustained—*quære?* *Ib.*

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H. W.

INTEREST.

See CO-PLAINTIFFS.

INTEREST OF CHILDREN IN A SETTLEMENT.

See HUSBAND AND WIFE, 1.

INTEREST OF LEGACY.

Where a testator bequeathed an annuity to his granddaughter for her life, and directed that if she should die during the lifetime of his widow, the annuity should be paid for the maintenance of the children of the granddaughter, and that from and after the decease of his widow and granddaughter, the value of the amount of the annuity (such a sum as would produce it according to the then legal rate of interest) should be paid to all and every the child and children of the granddaughter, if more than one, to be equally divided amongst them when and as they should respectively attain the age of twenty-one years, and if there should be but one, then the whole to such one child, with a gift over, in case of the death of the granddaughter without issue, who should attain the age of twenty-one,—the children of the granddaughter are not entitled to the annuity or interest of the fund after the death of the widow and their mother, until they attain the age of twenty-one years. *Festing v. Allen*, 575

INTERPLEADER.

A life insurance company received notice of an assignment, by an insurer of a policy which the company had granted, and the insurer afterwards became bankrupt. Soon after the death of the person whose life was assured, the party to whom the assignment had been made applied for the payment of the sum due upon the policy, and the company inquired of

the assignees of the bankrupt whether there was any objection to payment being made to the claimant. The assignees did not assent to the payment, but made no positive claim to the policy. In the mean time an action was brought upon the policy by the claimant in the name of the bankrupt, against the company:—*Held*, that it was a case in which the company were entitled to file their bill of interpleader against the plaintiff in the action, the bankrupt, and his assignees; and that the assignees, who had in the suit shewn no title to the policy, must pay the costs. *Fenn v. Edmonds*, 314

INTESTACY.

See NEXT OF KIN, 1.

INVALID EXECUTION OF POWER.

See EQUITABLE JURISDICTION, 1.

INVALID CONTRACT.

See HUSBAND AND WIFE, 2.

INVESTMENT.

The testator gave to the executors and trustees appointed by his will so much of his personal estate as would produce a certain annuity, upon trust to select, appropriate, and set apart the same, in their uncontrolled discretion, and pay the interest, dividends, and annual produce thereof to his widow for her life or widowhood; and if the annual produce of the personal estate and effects so set apart and appropriated should from any cause be increased or reduced, his widow was to receive such increased or reduced interest, dividends, and annual produce; and, from and after her decease or second marriage, the testator directed that the personal estate and effects so appropriated or set apart should fall into his residuary estate.

And the testator empowered his trustees, at their own discretion, to permit the whole or any part of his personal estate to remain on the securities on which the same might happen to be at his decease, or otherwise to convert and alter the same at their own absolute discretion. The testator's personal estate was invested in foreign funds. The trustees did not exercise their discretion as to the appropriation of the investments to answer the annuity, but submitted to act as the Court should direct:—*Held*, that the Court would not direct any appropriation of the foreign funds to answer the annuity to the widow, but would direct the annuity to be raised by the purchase of Consols, referring it to the Master to inquire what part of the existing investments it would be proper for that purpose to call in, having regard to the interests of other parties under the will. *Prendergast v. Lushington*, 171

IRREGULARITY.

See AMENDMENT.

ISSUE.

See STATUTE OF WILLS, 7 W. 4 & 1 Vict. c. 26.

ISSUE OR INQUIRY.

See RECTIFYING SETTLEMENT.

JOINT-STOCK BANK SHARES.

See MORTGAGOR AND MORTGAGEE, 1, 2, 3, 4.

JOINT-STOCK COMPANY.

1. The solicitor who had projected, and at his own expense brought forward, a scheme for making a railway, entered into an agreement with the persons who became the provisional committee for prosecuting the

undertaking, that the costs and expenses should be paid by such solicitor and projector, and that the members of such provisional committee should not be personally liable to him for such costs and disbursements, but that the same should be paid out of the fund to arise from the deposits to be paid on the shares:—*Held*, that this agreement was not illegal as between the provisional committee and the shareholders, regarded as trustee and cestui que trust, inasmuch as the trustee was entitled to be indemnified by his cestui que trust in respect of the costs and expenses properly incurred. *Parsons v. Spooner*, 102

2. Whether the contract to pay future costs out of the deposits was illegal as between the solicitor and client, attending to the fact, that the client, being a trustee, might properly stipulate that he should not be personally liable for the costs to be incurred, but that the same should be paid exclusively out of the trust-fund—*Quære?* *Ib.*

3. One of the members of the committee of management of a joint-stock company sold his shares to the committee, on behalf of the company, at a price not exceeding the market price of the shares at that time. The shares were transferred to the trustees in trust for the company, and the vendor thenceforward ceased to interfere in their affairs. Three years after it was known to the shareholders generally that the shares had been sold to the company, the company having during that time continued the business, and having obtained new Parliamentary powers, the Plaintiff, on behalf of himself and all the shareholders in the company, filed his bill against the vendor to set aside the sale and transfer of the shares as fraudulent; and to obtain contribution from the vendor towards the debts of the company. The Court refused to dis-

turb the sale, and dismissed the bill, with costs. *Walford v. Adie*, 112

4. Bill against the directors of a railway company, provisionally registered but not incorporated, brought by *A.* and *B.* (alleging themselves to be holders of scrip of certain shares on which they had paid the deposits), on behalf of themselves and all other the shareholders of the company, except the defendants, stating that the objects of the undertaking had been improperly diverted by the Defendants, and seeking to charge them with the amount of losses occasioned by their alleged misconduct, and also to have the deposits returned, or the assets administered and the surplus divided. Plea, by one of the Defendants, that, before the bill was filed, the Plaintiff *B.* had sold and assigned to one *C.* the shares in the bill mentioned to have been allotted to *B.*, and that, at the time the bill was filed, all right, title, and interest in the said shares were vested in *C.*, and that *B.* had at such time no interest therein,—allowed, but owing to the generality of the averments in the plea, as to the transaction constituting, or assumed to constitute, the alleged sale and assignment, the costs were reserved. *Doyle v. Muntz*, 509

5. Held, also, that the bill could not be sustained on the suggestion that *B.*, although he had parted with his interest in the shares, was still liable to third persons, and therefore entitled to call upon the directors to administer the assets of the company in discharge of its liabilities. *Ib.*

6. That the bill could not be maintained on the suggestion that *C.* was a party to the suit, as being one of the "other shareholders" for whose benefit it was brought, for such "other shareholders" must be not merely other persons, but persons owning other shares than those held, or claimed to be held, by the Plaintiffs named on the record. *Ib.*

7. That *B.* was not in such a case suing as a trustee for *C.*,—that he was not entitled to sue in that character,—and that parties allowed in such cases to represent absent shareholders must be parties having the beneficial interest in the shares in respect of which they seek relief. *Ib.*

8. A railway company resolved to raise a sum of money upon loan-notes, payable at the end of five years, bearing interest at 5*l.* per cent. in the mean time, with an option to the holders to convert them, at the expiration of three years, into shares of the company, at a certain rate per share, under the powers of an act of Parliament, to be applied for as early as possible; and the company advertised for tenders accordingly,—one half of the loan to be paid to the company when the tenders should be accepted (February, 1842), one quarter on or before the 15th of April, and the other quarter on or before the 15th of July following. The loan was made by various persons, to whom, on the payment of the last instalment (July, 1842), loan-notes were delivered, promising to pay the sums expressed therein on the 15th of February, 1847, with an indorsement thereon referring to the resolution, and intimating that in pursuance thereof application was intended to be made to Parliament for an act, under the terms of which the bearer would be entitled, on the 15th of February, 1845, provided previous notice was given, to convert the loan-notes into shares, at the price mentioned in the resolution. An act was afterwards obtained, enabling the company, for the purposes therein mentioned, to issue new shares of such amount, and to be appropriated and disposed of in such manner, for such prices, and by such ways and means, as by the order of a meeting of the

company should be determined. By a meeting of the company, subsequently held, it was resolved, that the new shares authorized by the act should be raised and allotted to and amongst the holders of loan-notes, in the manner and upon the terms directed by the act:—*Held*, that the effect of the act, and the subsequent resolution of the company, was not to allot the new shares amongst all the loan-note holders unconditionally, but only as they had acquired a right to such allotment by virtue of their antecedent contract. *Campbell v. the London and Brighton Railway Company*, 519

9. That the term of five years, at the end of which the notes were to be paid off, must be reckoned from February, 1842, when the first instalment of the loan was advanced; and that the three years, during which the holders were to have the option of converting the notes into shares, must be reckoned from the same time. *Ib.*

10. That, from the nature of the property which was the subject of the option, time was of the essence of the contract. *Ib.*

11. That the indorsement on the loan-notes did not enlarge the time of the option by continuing it until limited by an act of Parliament or otherwise—but whether the company had power to restrict the option, by requiring notice *before* the 15th of February, 1845, (the end of the three years), or whether the loan-note holders accepting the notes with the indorsement expressing that restriction, without objection or protest, would be bound thereby—*quære?* *Ib.*

12. The company could only be understood as contracting to apply for an act of Parliament, having the effect suggested, but could not be understood as guaranteeing the lenders of the money that such an act should be obtained. *Id.* 534

JOINT TENANCY.

A bequest of property to be at the disposal of the testator's wife, for herself and children, does not give the widow a power of appointment, or make the widow and children tenants in common, but creates a joint tenancy. *Crockett v. Crockett*, 326

JUDGMENT-CREDITOR OF TESTATOR.

See ADMINISTRATION SUIT, 3.

JUDGMENT.

See STAT. 13 ELIZ. c. 5.

LAPSE.

See STAT. OF WILLS, 7 W. 4 & 1
Vict. c. 26, 2.

The testator gave his real and personal estate to his executors, upon trust, after conversion and payment thereof of his debts, funeral, and testamentary expenses and legacies, to stand possessed of the residue, and divide the same into ten equal parts or shares, which he bequeathed to ten persons named in his will, and he declared that if the net residue of his property, after payment of the debts, &c., should exceed 10,000*l.*, then 10,000*l.* only should be applicable to the said trusts (1000*l.* to each share); and in that case the testator gave the residue of his said property beyond the sum of 10,000*l.* to his nephews and nieces in equal shares. The net residue after the payment of debts, &c., exceeded 10,000*l.* One of the tenth shares of the 10,000*l.* lapsed by the death, in the testator's lifetime, of one of the ten legatees:—*Held*, that the lapsed share of 1000*l.* did not pass as residue to the nephews and nieces, but was undisposed-of. *Green v. Pertwee*, 249

640 **LIABILITY, &c.**

LEASE.

See COVENANT, 1, 4.

**LEASES, FOR LIVES, AND
YEARS.**

See FINES ON RENEWAL.

LEGACY.

See CONSTRUCTION, 2, 3.

INTEREST OF LEGACY.

LAPSE.

SET-OFF.

UNITARIAN CONGREGATIONS.

**LEGACY CHARGED ON REAL
ESTATE.**

*See GENERAL ORDER, XXX. OF
August, 1841.*

**LEGACY FOR THE PUBLIC
BENEFIT.**

See CHARITABLE USE.

**LEGACY TO A WIFE FOR
HERSELF AND CHILDREN.**

See JOINT TENANCY.

LEGATEES.

See PRELIMINARY INQUIRIES.

LIABILITY.

See PARTNERSHIP, 1, 2, 4, 6, 7.

**TRUSTEE AND CESTUI QUE
TRUST, 2, 3.**

**LIABILITY OF MORTGAGEE
OF JOINT STOCK BANK
SHARES TO BANK DEBTS.**

*See MORTGAGOR AND MORTGAGEE,
1, 2, 3, 4.*

MINING PARTNERSHIP.

**LIABILITY OF THE ESTATE
OF A DECEASED PARTNER.**

See PARTNERSHIP, 1, 2, 4.

**LIABILITY OF THE PARTIES
TO A CONTRACT, TO THIRD
PERSONS.**

See ANNUITY.

**LIABILITY OF SHARE-
HOLDERS.**

See JOINT STOCK COMPANY.

LIEN.

See FINES ON RENEWAL 6.

LOAN-NOTES.

See JOINT STOCK COMPANY, 8, 9, 11.

LOCAL ACT.

See ACT OF PARLIAMENT, 2.

LUNATIC.

See STAT. 1 W. 4, c. 60.

MAINTENANCE.

See REMOTENESS.

MASTERS' REPORT.

See EXCEPTIONS.

MINING SHARES.

See DEMURRER, 2.

MINING PARTNERSHIP.

See JOINT STOCK COMPANY, 3.

MISDESCRIPTION.

See PLAINTIFF.

VENDOR AND PURCHASER.

MISREPRESENTATION.

See EVIDENCE, 1.

MISTAKE OF PRACTICE AT LAW.

The Court refused an injunction to restrain Plaintiffs in an action at law from taking out of court money which the Defendants at law had paid into court in the action, in ignorance that, upon such payment, the Plaintiffs at law were entitled to stay their action, and take the sum so paid. Such ignorance or inadvertence does not amount to that kind of mistake against the consequences of which equity will interpose to relieve: *Semble. Great Western Railway Company v. Cripps*, 91

MORTGAGE.

See FINES ON RENEWAL, 6.

MORTGAGOR AND MORTGAGEE.

See INSOLVENT DEBTOR, 1.

PARTIES, 2.

PRIORITY OF INCUMBRANCERS, 1, 3, 4, 5, 7, 8.

1. Transfer, by way of mortgage, of shares in a banking company. The mortgagor afterwards paid off the debt, and applied for a retransfer of the shares, but the directors of the bank did not permit the retransfer to be made. In the meantime a creditor recovered judgment against their public officer, and threatened execution against the mortgagee, as one of the shareholders:—*Held*, that, where the mortgage was made simply as an

absolute transfer, subject to redemption, and nothing had passed binding the mortgagor to take a retransfer of the shares, the mortgagor was not liable to indemnify the mortgagee against debts incurred after the transfer made on the mortgage, and before the mortgage debt was paid off. *Phené v. Gillan*, 1

2. That, the mortgagor having elected to take a retransfer of the shares, the mortgagee became a trustee of the shares for the mortgagor, and the mortgagor was bound to indemnify him against the whole expenses or liabilities which he had properly incurred by holding and maintaining the shares. *Ib.*

3. That the mortgagor, indemnifying the mortgagee in respect of the costs, was entitled to take proceedings in the name of the mortgagee, to compel a retransfer of the shares, and to resist the proceedings against the shareholders under the judgment. *Ib.*

4. The mortgagee has not, in such a case, any right at law against the mortgagor, *semble*. *Ib.*

5. Whether the directors of the company, preventing the shares from being retransferred, are necessary parties to the suit, in order to give the Plaintiff complete relief—*quære?* *Ib.*

6. The statute 1 & 2 Vict. c. 110, s. 68, does not make it the duty of a mortgagee, as against the provisional assignee of an insolvent mortgagor, to obtain an order from the commissioners of the Insolvent Debtors' Court for a conveyance of the equity of redemption; and an offer by the provisional assignee to facilitate the proceedings in such an application does not entitle him to his costs in a suit subsequently instituted against him for foreclosure. *Grigg v. Sturgis*, 93

7. *Stephen* took a conveyance of an estate from *William*, his father, and then mortgaged the estate, with a power of sale on default of payment

of the mortgage money and interest within three months after notice, in writing, given to *Stephen*, his heirs, executors, administrators, or assigns, or left at his or their usual or last known place of abode. The conveyance to *Stephen* from *William* was afterwards declared void, as against the creditors of *William*. Some years afterwards, the mortgagee caused the notice demanding payment to be affixed to the door of the house which was the last known place of abode of *Stephen*; and the mortgagee, a short time before the expiration of the three months, entered into a contract for the sale of the property:—*Held*, that as the right of the mortgagee under the power of sale was paramount to that of the creditors of *William*, the notice to *Stephen* was sufficient. *Major v. Ward*, 598

8. That such notice was well served by being fixed on the door of *Stephen's* last known place of abode. *Ib.*

9. That the contract for sale of the property, although made before the expiration of the notice, was not therefore invalid. *Ib.*

MOTION.

See AWARD, 3.

DISMISSAL OF BILL, 2, 3.

VENDOR AND PURCHASER, 2, 5.

A motion which has been opened cannot be afterwards treated by the party moving as an abandoned motion; but the parties opposing are entitled to costs as on a motion refused. *Dugdale v. Johnson*, 92

MOTION EX PARTE.

See EVIDENCE, 3.

NEGLIGENCE.

See TRUSTEE AND CESTUI QUE TRUST, 2, 3.

NOTICE.

NEGLIGENCE IN PERMITTING MORTGAGOR TO RETAIN THE TITLE-DEEDS.

See PRIORITY OF INCUMBRANCERS, 4.

NEW TRIAL.

See INJUNCTION, 2.

NEXT OF KIN.

1. The testatrix devised and bequeathed the rents, issues, and profits of her real and personal estate to her sister for life, and upon and after her decease, upon trust to sell the real estate, and pay the money arising therefrom to such persons as the testatrix should, by any codicil, direct; and, if she should not bequeath the same by any codicil, then to pay the same unto and amongst her next of kin: and, by her codicil, the testatrix revoked the former devise and bequest made by her will, and devised and bequeathed all the said real and personal estate to other trustees, upon the like trusts, but directed that all "the said residue" should be paid to her next of kin on the part of her mother, and not to any of her next of kin on the part of her father:—*Held*, that the testatrix died intestate as to the residuary personal estate. *Say v. Creed*, 580

2. That the next of kin of the testatrix, ex parte maternâ, at the death of the tenant for life, were, under the codicil, entitled to the proceeds of the real estate. *Ib.*

NOTICE.

See JOINT STOCK COMPANY, 11.

PRIORITY OF INCUMBRANCERS, 1, 2, 3.

STAT. 8 & 9 VICT. c. 18.
(LAND CLAUSES CONSOLIDATION ACT).

NOTICE OF SALE.

See MORTGAGOR AND MORTGAGEE,
7, 8.

NOTICE TO EQUITABLE
MORTGAGEE WHEN HE
ACQUIRED THE LEGAL ES-
TATE, OF OBLIGATIONS OF
THE MORTGAGOR AFFECT-
ING THE PROPERTY.

See PRIORITY OF INCUMBRANCERS, 3.

OBJECTION.

See EXCEPTIONS.

OBJECTIONS TO TITLE.

See VENDOR AND PURCHASER, 3, 6.

OCCUPATION RENT.

See TENANT IN COMMON.

Reference to fix an occupation rent,
in account of arrears of dower. *Bam-*
ford v. Bamford, 206

OFFICIAL ASSIGNEE.

See INSOLVENT DEBTOR, 1.

ORDER PASSED AND EN-
TERED.

See AFFIDAVIT OF SERVICE.

PARTIES.

See AMENDMENT.

BILL OF EXCHANGE.

MORTGAGOR AND MORT-
GAGEE, 5.

PRIORITY OF INCUMBRANCERS,
6.

1. Bill by a debtor, who had con-
veyed property to a trustee for the
benefit of his creditors, to have the
trusts of the deed administered by the
Court, charging that one of such cre-
ditors had forfeited his debt by a

breach of his covenant not to sue or
molest the debtor:—*Held*, that the
creditors, parties to the deed, other
than the trustee and the creditor
charged with the breach of covenant,
were sufficiently made parties by be-
ing served with copies of the bill
under the 23rd Order of August,
1841. *Duncombe v. Levy,* 232

2. *A.*, having a life estate, with re-
mainder over in strict settlement,
subject to a mortgage of the settled
property for a term of 1000 years,
demised the property for a term of
200 years if he should so long live.
A purchaser of the term of 200 years
filed his bill to redeem the term for
1000 years, who was the first mort-
gagee of the estate:—*Held*, that *A.*,
the owner of the life estate, subject to
the term of 200 years, was a necessary
party. *Hunter v. Macklew,* 238

3. In a suit to execute the trusts of
a will devising real estates to trustees
for certain persons for life, and after
their decease, for sale; with power to
give discharges for the proceeds and
the rents and profits, and with a di-
rection to stand possessed of the
monies to arise thereby, upon trust
for the children of the tenants for
life, the trustees and the tenants for
life being Defendants—but there be-
ing no power of sale until after the
death of the tenants for life, the
Court, notwithstanding the 30th
Order of August, 1841, directed that
the children of the tenants for life
should be made parties. *Cox v.*
Barnard, 253

PARTNERSHIP.

1. *A.* deposited monies with *B.*,
C., and *D.*, who were bankers in
partnership, and received from them
notes, in which they promised to pay
him the amount three months after
sight, with interest. *B.* died in
March, 1837, having appointed *C.*

and another his executors. *C.* and *D.* continued the banking business in the same name until 1842, and interest was regularly paid on the notes by the firm until that time,—the payment being indorsed upon the notes, and signed by one of the partners or their clerk. In December, 1843, the executors of *A.* filed their bill against the executors of *B.*, and the devisees under his will, for payment of the amount of the notes out of the personal or real estate of *B.*:—*Held*, that the acts of the surviving partners of *B.* had not the effect of taking the debt upon the notes out of the operation of the Statute of Limitations as against the real or personal estate of the deceased partner. *Way v. Bassett*, 55

2. A creditor of a partnership, against whose debt the estate of a deceased partner is, in a suit directly instituted against that estate, entitled to the protection of the Statute of Limitations, cannot (on a bill against the surviving partners and the representatives of the estate of the deceased partner, alleging that the surviving partners are indebted to the deceased partner) recover his debt against the separate estate of such deceased partner, on the ground of the equity of the partners amongst themselves to enforce an adjustment of the partnership transactions; for the creditor can at the utmost only stand in the place of the surviving partners as against the estate of the deceased partner, and in such a case the surviving partners have no claim on the estate of the deceased. *Id.*

3. Acts done by one of the surviving partners, who was executor of the deceased partner, and which the surviving partners were in that character bound to do, cannot *prima facie* be considered to have been done in the character of executor. *Id.*

4. After a dissolution of partner-

ship by death or otherwise, the surviving or continuing partners of the firm are, (in a suit against them by persons claiming to be creditors of the partnership), entitled to the protection of the Statutes of Limitation, although, as between themselves and retired partners, or the estates of deceased partners, the partnership accounts are unsettled; and the retired partners, or the executors of a deceased partner, are in such a suit against them entitled to the like protection. *Id.* 68

5. A partnership agreement between *A.* and *B.*, that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the Statute of Frauds; and such an agreement being proved, *A.* or *B.* may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing. *Dale v. Hamilton*, 369

6. Two solicitors having entered into partnership, each of them continued to attend to the business of his former clients, but on the partnership account; and one of the partners having proposed to invest a sum of money belonging to a client in a certain mortgage, the proposal was agreed to by the client, and the money was paid to the joint account of the partnership, at their bankers, for the purpose of the investment. The negotiations for the mortgage were broken off by the proposed mortgagor, but the partner by whom the proposal had been made to the client untruly represented to the client that the mortgage had been effected, and thenceforward continued to pay the interest as if it had actually been done. Although the banking account was kept in the name of the firm, the mo-

nies standing to the account belonged exclusively to the partner who committed the fraud; he alone attended to and had the control of the account, and the fraud was unknown to the other partner. Five years after the receipt of the money from the client the partnership was dissolved; and ten years after the dissolution of the partnership, the partner who had committed the fraud became bankrupt, and the client, who from the time of the dissolution until the bankruptcy had continued to employ him as his solicitor, discovered the fraud. The client then filed his bill against the other partner to recover the money: —*Held*, that the Defendant was originally liable to the Plaintiff for the money received by the firm; that his original liability was continued, as well after as before the dissolution of the partnership, by the fraudulent representations of his former partner; and that in equity the limitation in bar of the claim did not begin to run in favour of the Defendant until the time when the client discovered the fraud. *Blair v. Bromley*, 542

7. That the fraud and misrepresentation of one of the partners entitled the client to relief in equity against the other, not only if the case was one in which the client might have recovered in an action at law against such other partner, but also if the remedy at law against the other partner was barred by the lapse of time.

Id.

PART PAYMENT.

See ANNUITY.

PAROL CONTRACT.

See AWARD, 6.

PAUPER.

See DISPAUPERING

PAYMENT.

See STATUTE OF LIMITATION, 3 & 4 WILL. 4, c. 27, ss. 2, 3.

PETITION.

See RE-HEARING.

STAT. 1 WILL. 4, c. 60, s. 2.

PLAINTIFF.

See STAT. 1 WILL. 4, c. 60.

The Plaintiff brought her bill for redemption, describing herself as A. B., the widow of the mortgagor, and claiming as his devisee and executrix; but she obtained probate of the will as A. C., otherwise B., spinster: —*Held*, that, as the description of the Plaintiff in the suit involved the question of her title under the will, the above variance did not entitle the Defendant to have the bill taken off the file, or security given for costs. *Griffith v. Ricketts*, 195

PLAINTIFF IN CROSS SUIT
OUT OF JURISDICTION.

See SECURITY FOR COSTS.

PLEADING.

See AMENDMENT.

BANKRUPT, 1.

CHARITY.

CO-PLAINTIFF.

EXECUTOR DE SON TORT, 3.

JOINT STOCK COMPANY, 4, 5, 6.

PLAINTIFF.

POOR'S RATE.

See TITHES.

POWER.

See INVESTMENT.

STATUTE OF WILLS, 7 Will. 4 & 1 Vict. c. 26, 1.

POWER OF APPOINTMENT.

See JOINT TENANCY.

RECTIFYING SETTLEMENT.

POWER OF ARBITRATORS.

See AWARD, 4.POWER OF COMMISSIONERS
FOR INCLOSURE.*See* ACT OF PARLIAMENT, 1.POWER TO APPOINT NEW
TRUSTEES.*See* CONSTRUCTION, 1.POWER TO CONTINUE A
FARMING BUSINESS.*See* ELECTION.

POLICY OF INSURANCE.

See INTERPLEADER.

PRACTICE.

See ADMISSION AND DISCHARGE.

ADMINISTRATION SUIT.

AFFIDAVIT OF SERVICE.

AMENDMENT.

ATTORNNMENT.

ANSWER.

AWARD.

COPIES OF THE BILL.

CO-PLAINTIFFS.

DECREE.

DEMURRER.

DISMISSAL OF BILL.

DISPAUPERING.

EXCEPTIONS.

GENERAL ORDERS.

HEARING.

MOTION.

MOTION EX PARTE.

PLAINTIFF.

PRELIMINARY INQUIRIES.

REFERENCE.

RE-HEARING.

RESTORATION OF BILL.

RULE OF COURT.

SECURITY FOR COSTS.

SEQUESTRATION.

SERVICE OF NOTICE OF SALE.

SETTING DOWN CAUSE.

SUBPENA TO HEAR JUDGMENT

SUPPLEMENTAL BILL.

TAKING BILL OFF FILE.

PRELIMINARY INQUIRIES.

The Plaintiff, under a will, claimed a fund over which the testatrix had a power of appointment, and which was subject to a gift over, in default of appointment, to the children of the donor of the power. The trustees did not admit that the will was an effectual appointment:—*Held*, that, although the Plaintiff's title was not admitted, it was a case in which the persons entitled in default of appointment were necessary parties, and where the Court would therefore, under the Order V. of the 9th of May, 1839, direct preliminary inquiries to ascertain who were such persons. *Johns v. Dickinson*, 130

PRESENTMENT.

See PROMISSORY NOTE.

PRINCIPAL AND AGENT.

See EXECUTOR DE SON TORT, 2.

The agent employed by a miner, in the management of his mines, and in his communications with the commissioners for setting out the metes and bounds and fixing the rents and duties in respect thereof,—is not therefore the agent of the miner for the purpose of making a contract with the commissioners not within the powers which had been conferred upon them in that character. *Attorney-General v. Jackson*, 365

PRIORITY OF INCUMBRANCES.

1. A first mortgage of real estate was made to *A.* in fee. A second mortgage was then made to *B.* of the same estate, together with other real estate, by a release and conveyance of the respective premises to *C.*, as a trustee for *B.*, with power of sale. *B.* afterwards advanced a further sum to the mortgagor on the security of the same estates, but gave no notice of the advance to *A.* or *C.* Subsequently, *C.* (after inquiry of *A.* whether he had notice of any incumbrance other than his own, and that of which *C.* was a trustee for *B.*) advanced a further sum to the mortgagor on the same security, and gave notice of his mortgage to *A.*:—*Held*, that the several mortgages took effect, with regard to the different estates, according to the order of time at which they were respectively created; and that their priorities were not affected by the giving, or the omitting to give, notice to the party in whom the legal estate was vested. *Wilmot v. Pike*, 14

2. That the doctrine of notice, applicable in determining the priority of charges on choses in action, does not prevail as to equitable estates in land. *Ib.*

3. Four trustees sell out stock, under an agreement that the proceeds shall be lent to two of them, upon equitable mortgage, by deposit of the documents of title of a copyhold estate which belonged to such two trustees in undivided moieties. The money was lent, and the documents deposited; but afterwards, by some unexplained means, they came into the hands of one of the two trustees who had borrowed the fund, and that trustee made a second equitable mortgage on his own moiety of the estate, by depositing the documents with a third person, who took them without notice

of the first mortgage; that trustee afterwards became bankrupt, and the second equitable mortgagee purchased and obtained from the assignees of the bankrupt a surrender, and was admitted tenant of the bankrupt's undivided moiety, having, at the time of such purchase of the legal estate, received constructive notice of the first mortgage. In a suit by one of the trustees (the lender of the trust fund, the other having become bankrupt) for foreclosure:—*Held*, that the second equitable mortgagee, who had taken the legal estate with notice of the obligations of the mortgagor to third parties, could only hold that estate subject to such obligations, notwithstanding that he had originally taken his mortgage security without notice. *Allen v. Knight*, 272

4. That, in the absence of any suggestion of a specific case, as against the plaintiff, charging him with acts whereby the mortgagor was enabled to commit the fraud, the mere fact of the possession of the title-deeds by the mortgagor was not sufficient to postpone the claim of the first mortgagee. *Ib.*

5. That the fact of the loan of the proceeds of the stock having been a breach of trust did not affect the question as between the first and second mortgagees. *Ib.*

6. That the cestui que trusts of the stock, not having been parties to or adopted the mortgage, were not necessary parties to the suit for foreclosure. *Ib.*

7. *P.* being indebted to *B.* makes a mortgage of an equity of redemption of real estate to *B.* for the purpose of securing the debt, and, by the indenture of mortgage, it was falsely recited, that the mortgaged estate was subject to an equitable charge for monies due to *J.*, secured by the deposit of a deed. *P.* retained the deed in his own possession, and subse-

quently deposited it with *J.* as a security for money partly lent to *P.* by *J.* before, and partly after, the mortgage of the estate to *B.* *J.*, at the time of the deposit, had no notice of the prior mortgage to *B.* :—*Held*, that inasmuch as an actual prior charge on the estate, if afterwards paid off by *P.*, or otherwise avoided, would have left *B.* in the position of the first mortgagee of the equity of redemption,—the recital of a charge, which had in fact no existence, could not have the effect of postponing *B.* *Fraser v. Jones*, 475

8. That the interest acquired by *J.*, by the subsequent mortgage by way of deposit, could not be enlarged by the effect of the false recital, and was only an interest in the equity of redemption, subject to the mortgage to *B.*; and that *B.*, in a suit for that purpose, was entitled, as against *J.*, to the ordinary decree for payment or for foreclosure, and delivery up of the deed on default. *Id.*

PROBABILITIES.

See FINES ON RENEWAL, 1.

PROJECTORS OF RAILWAY.

See JOINT STOCK COMPANY, 1.

PROMISSORY NOTE.

See STATUTE OF LIMITATIONS.

PROVISIONAL ASSIGNEE.

See MORTGAGOR AND MORTGAGEE, 6.

PROVISIONAL ASSIGNEE.

See VENDOR AND PURCHASER, 1.

PROVISIONAL COMMITTEE.

See JOINT STOCK COMPANY, 1.

PUBLIC OR PRIVATE ACT.

See ACT OF PARLIAMENT, 3.

PURCHASER.

See EQUITABLE MORTGAGEE.

RAILWAY COMPANY.

See JOINT STOCK COMPANY, 1, 4, 8. TITHES.

RECTIFYING SETTLEMENT.

In a marriage settlement the property of the wife was conveyed and assigned in trust for the wife for life for her separate use, remainder to the husband for his life, remainder to the children of the marriage, and in default of issue of the marriage, to the brother of the wife and his children. After the marriage the husband and wife filed their bill, charging that the brother, who was one of the trustees of the settlement, in concert with the solicitor's clerk, who took the instructions for and attended the execution of the settlement, had fraudulently omitted or erased from the deed a general power of appointment by the wife, in default of issue of the marriage, and praying that the settlement might be rectified by inserting such a power. The wife did not prove the instructions for the insertion of such a power, nor the fraud in omitting or erasing it, but it appeared by the evidence that the power had been introduced in the draft settlement prepared by counsel, and also in the engrossment; and the answer of the brother stated, that, the power having been noticed by him when the engrossment was read over to him, he objected to it, as not being according to his understanding of the intentions of the wife, when the solicitor's clerk admitted it was not, and struck it out. The Court held, that it was the duty

REMOTENESS.

of the brother, as one of the trustees, not to have permitted the power to be struck out without the express directions of the intended wife on that point; and that relief might be given in the suit, subject to the question whether the wife knew, when she executed the settlement, that it did not contain the power. *Harbidge v. Wogan*, 258

REFERENCE OF TITLE.

See DISMISSAL OF BILL, 3.

VENDOR AND PURCHASER, 2, 5, 6.

REHEARING.

Cause set down again for hearing on further directions, on the petition of Defendants out of the jurisdiction at the first hearing, who subsequently appeared,—in order to enable them to appeal from the decree. *Prendergast v. Lushington*, 177

REMEDY AT LAW.

See PARTNERSHIP, 7.

REMOTENESS.

In a devise of real estate upon trust for the daughter of the testator for her life, and from and after her decease to convey such estate unto and equally between and among all and every the child and children of the daughter, who should live to attain the age of twenty-three years, and to his, her, and their heirs and assigns for ever; and in case there should be no such child or children, or, being such, all of them should die under twenty-three without issue, then over, with power to apply for maintenance; the interest of such child's share, notwithstanding such child's share should not be then absolutely vested,—the limitation to the children of the

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daughter and the limitations over on default of such children, are void for remoteness. *Bull v. Pritchard*, 567

RENEWAL.

See COVENANT, 4.

REPUBLICATION.

See STAT. OF WILLS, 7 WILL. 4 & 1 VICT. c. 26, s. 34, 3.

RESCINDING CONTRACT.

See VENDOR AND PURCHASER, 4.

RESIDUE.

See LAPSE. 2

RESOLUTION.

See JOINT STOCK COMPANY, 8.

RES INTER ALIOS ACTA.

See AGREEMENT.

RESTORATION OF BILL.

See DEMURRE R, 1.

REVOCATION.

Where a will was written in ink, and formally executed, and the testator afterwards drew a line in pencil through a clause in the will,—*Held*, that the erasure in pencil raised no presumption of revocation, and that, without other explanation, it was properly regarded not as a revocation of the clause, but as merely deliberative, or indicative of some future and incomplete purpose. *Francis v. Grover*, 39

RULE OF COURT.

See AWARD, 1, 2, 3

SALE.

See EQUITABLE MORTGAGEE.
PARTIES, 3.
STAT. 1 WILL. 4, c. 60.

SALE OF SEQUESTERED
PROPERTY.

See SEQUESTRATION.

SALE OF SHARES BY DI-
RECTOR TO THE COM-
PANY.

See JOINT STOCK COMPANY, 8.

SECURITY.

See FINES ON RENEWAL, 6.

SECURITY FOR COSTS.

See PLAINTIFF.

PLAINTIFF OUT OF JURISDIC-
TION.

The plaintiff in a cross suit, (impeaching an instrument which the original suit seeks to enforce) although residing out of the jurisdiction, is not bound as against the Plaintiff in the original suit, to give security for costs.
Vincent v. Hunter, 320

SEPARATION.

See HUSBAND AND WIFE, 2.

SEPARATE MAINTENANCE.

See HUSBAND AND WIFE, 2.

SEPARATE USE.

See HUSBAND AND WIFE, 2, 3.

SEQUESTRATION.

A sequestration on mesne process will, in a proper case, be executed, and the Court will direct the tenants to attend to the sequestrators; but will not, until the amount of the costs

is ascertained, nor except for the purpose of paying such ascertained amount of costs, direct the sale of goods seized under the sequestration, even though the value of the goods be gradually absorbed by the expenses of keeping them. *Goldsmith v. Goldsmith,* 123

SERVICE.

See AFFIDAVIT OF SERVICE.

SERVICE OF NOTICE OF
SALE.

See MORTGAOR & MORTGAGER, 8.

SETTLEMENT.

See HUSBAND AND WIFE, 1, 2, 3.

SETTING ASIDE AWARD.

See AWARD, 5.

SET-OFF.

Where a debt to the estate of a testator may be set off by the executors, against a legacy bequeathed by the testator to the debtor, such debt may also be set off against a legacy bequeathed by the testator to the wife of the debtor, subject to her equity (if any) in the legacy. *M'Mahon v. Burchell,* 325

SETTING DOWN CAUSE.

See BANKRUPT, 1.

SEVERANCE OF DEFEND-
ENTS IN THEIR ANSWERS.

See ANSWER, 3.

SHAREHOLDERS.

See JOINT STOCK COMPANY, 1, 6, 7.

SHARES.

See JOINT STOCK COMPANY, 3, 4, 8, 9.

SPECIFIC PERFORMANCE.

SOLICITOR AND CLIENT.

See JOINT STOCK COMPANY, 2.

SOLICITOR.

See PARTNERSHIP, 6, 7.

SPECIFIC PERFORMANCE.

See COVENANT, 4, 5.

DEMURRER, 2.

DISMISSAL OF BILL, 3.

VENDOR AND PURCHASER, 2, 7.

A., *B.* and *C.* possessed of a manor, under an ecclesiastical lease, agreed with *M.* to grant him, upon the expiration of a subsisting grant, a copy of court-roll of a tenement holden of the manor, and entered into a joint and several bond to perform the contract. *A.* afterwards conveyed his interest in the manor to *B.*, subject to the agreement with *M.*, and died, having appointed the Plaintiff his executor. The validity of the lease, constituting the title of *B.* and *C.* to the manor, was subsequently impeached, and pending the trial of their right to the manor, they were unable to grant the copy of court-roll according to the agreement. *M.* thereupon brought three several actions, upon the bond, against the Plaintiff, *B.* and *C.*, respectively. The Plaintiff, *B.* and *C.*, entered into a consolidation rule, whereby they all consented to be bound by the verdict in one of the actions. The Plaintiff then filed his bill against *B.*, *C.*, and *M.*, for a specific performance of the contract by *B.* and *C.*, and to restrain the action brought by *M.* :—*Held*, that the question as against *M.* was the same both at law and in equity, and that after having consented to be bound by the verdict in the action, the Plaintiff could not sustain the suit, and the bill was dismissed without prejudice to any question of contri-

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bution or indemnity as between the Plaintiff, *B.* and *C.*, the obligors in the bond. *Hole v. Pearce*, 408

STATUTE 13 ELIZ. C. 5.

Whether, after the bankruptcy or insolvency of a debtor, any creditor (other than the assignees) can, in ordinary cases, sustain a suit to set aside a conveyance made by the debtor prior to the bankruptcy or insolvency, on the ground that such conveyance is fraudulent, within the stat. 13 Eliz. c. 5; or whether it is necessary that any creditor seeking to set aside such fraudulent conveyance must previously recover judgment at law for his debt,—*quare?* *Lister v. Turner*, 281

STATUTE 27 ELIZ. C. 4.

See EQUITABLE MORTGAGEE.

STATUTE OF LIMITATION,

21 JAC. 1, c. 16, s. 3.

See PARTNERSHIP, 1, 2, 4, 6, 7.

Where a promissory note was made payable at a certain time after sight, with interest thereon, and the interest was duly paid for several years, (as the bill alleged), the Court held, that the note must be taken to have been acted upon according to its form and tenour; and therefore, that the presentment for sight must have been duly made before the interest was paid; and that the payment became due upon the note at the prescribed date after such presentment, and that the Statute of Limitations would begin to run from the time the payment so became due. *Way v. Bassett*, 55

STATUTE OF FRAUDS, 29 CAR.

2, c. 3, s. 4.

See PARTNERSHIP, 5.

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H. W.

STATUTE OF FRAUDULENT DEVISES, 3 WILL. & M. c. 14.

See COVENANT, 1.

STAT. 9 & 10 W. 3, c. 15.

See AWARD, 1.

STAT. 1 WILL. 4, c. 60.

1. After a decree in a creditor's suit for the sale of the real estate of the testator, and the application of the proceeds in payment of the debt, and after a sale under that decree, the devisees of the estate, being lunatic or out of the jurisdiction, are trustees of the estate, within the stat. 1 W. 4, c. 60, for the plaintiff in the cause: *Semble. Jackson v. Milfield*, 538

2. If the devisees in such a case are not trustees for the Plaintiff, by the effect of the decree, the Court cannot make them such trustees by any declaration to that effect; and if the devisees are such trustees by the effect of the decree, an express declaration thereof (if necessary) should be made by decree, and cannot properly be made upon petition. *Id.*

STATUTE OF LIMITATION, 3 & 4 WILL. 4, c. 27, ss. 2, 3, 25, 42.

The testator gave an annuity to *A.*, and charged the same upon all his freehold and leasehold estate. He afterwards devised his freehold estates to trustees, (who were also his executors), upon trust (subject to the charge) to and for the use of his grandson and his heirs. The trustees, being in possession of the estates, paid the annuity to *A.* during the minority of the grandson, and within twenty years before the filing of the bill by *A.* against the grand-

son:—*Held*, that such payment of the annuity by the trustees prevented the claim of *A.* to the annuity from being barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27, ss. 2, 3.

That the grandson was not a trustee for the annuitant within the 25th section of the stat. 3 & 4 Will. 4, c. 27, or otherwise; and that, under the 42nd section of the same statute, the annuitant was not entitled to recover the arrears of the annuity for more than six years before the filing of the bill. *Francis v. Grover*, 39

STATUTE OF WILLS, 7 W. 4 & 1 VICT. c. 26; and ss. 33 & 34.

1. By a deed, made since the Statute of Wills, (7 Will. 4 & 1 Vict. c. 26), certain trust funds were appointed to trustees, in trust for such person or persons, for such interest or interests, and chargeable with such sum or sums of money, and for such intents and purposes, and in such manner, in all respects, as the appointor should, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by one witness or more, direct or appoint. The appointor afterwards made her will, (which was duly executed and attested according to the Statute of Wills), and thereby bequeathed part of the trust funds:—*Held*, that the will was a writing within the terms of the power. *Buckell v. Blenkhorn*, 131

2. The testator, by a will made before the Wills Act (7 Will. 4 & 1 Vict. c. 26) came into operation, bequeathed a share of his residuary estate to one of his sons, who was also thereby made one of the devisees in trust and executors of his estate. The son died after the Wills Act came into operation, leaving issue;

and, after his death, the testator made a codicil to his will, altering a bequest to another child, but in other respects confirming his will:—*Held*, that the gift to the son did not lapse, but that the same, so far as it was real estate, descended to the heir at law of the son, and so far as it was personal, to his executrix, under a will made before the Wills Act came into operation. *Winter v. Winter*, 306

3. That, under the 34th section of the Wills Act, the effect of the republication of the will by the codicil, was the same as if the testator had at the date of the codicil made a will in the words of the will so re-published. *Id.*

STATUTE 1 & 2 VICT. c. 110,
s. 68.

See MORTGAGOR AND MORTGAGEE,
6.

STATUTE 5 & 6 VICT. c. 116.
See INSOLVENT DEBTOR, 1.

STATUTE 8 & 9 VICT. c. 18,
(LAND CLAUSES CONSOLIDATION ACT), s. 84.

A railway company, having power to purchase a plot of land for their railway, entered upon the same to survey and take levels thereof, and probe or bore to ascertain the nature of the soil, and set out the centre line of the railway, and for that purpose they dug a trig line or trench two inches deep and fourteen inches wide across the plot of land, but they gave the owner of the land no previous notice of such entry as required by the 84th section of the Lands Clauses Consolidation Act (8 Vict. c. 18). Five days after the trig line was made, the owner of the land discovered the fact, and nine days from such discovery he filed his bill for an

injunction. Upon the affidavits on the part of the company, that the surveying and setting out of the line of railway was completed on the day the trig line was made, and that they had no occasion to enter and did not intend again to enter upon the land until they had taken the legal steps for permanently using it, the Court refused the injunction, but reserved the costs. *Fooks v. Wilts, Somerset, and Weymouth Railway Company*, 199

SUBMISSION TO ARBITRATION.

See AWARD, 1, 2, 3.

SUBPCENA TO HEAR JUDGMENT.

See BANKRUPT, 2.

SUCCESSIVE INTERESTS.

See FINES ON RENEWAL.

SUPPLEMENTAL BILL.

See BANKRUPT, 1.

SUPPLYING EXECUTION OF POWER.

See EQUITABLE JURISDICTION, 1.

SURVEYING AND SETTING OUT A RAILWAY LINE.

See STATUTE 8 & 9 VICT. c. 18,
(LAND CLAUSES CONSOLIDATION ACT).

TAKING BILL OFF FILE.

See PLAINTIFF.

TENANT IN COMMON:

A tenant in common occupying the
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premises held in common not excluding his co-tenants in common, is not chargeable by such co-tenants with an occupation rent. *M'Makon v. Burchell*, 322

TENANT FOR LIFE AND REMAINDER-MAN.

See FINES ON RENEWAL.

1. Devise and bequest of residuary real and personal estate to trustees, upon trust, with all convenient speed to sell the real estate and such part of the personal estate as was in its nature saleable, but the mode and time of sale and of settling and adjusting accounts, and of requiring payment of what should be due to the testator, to be left entirely to the discretion of the trustees, and until such sale and the final adjustment of his co-partnership accounts, the rents and income of the real and personal estate remaining unsold, and the interest on any debt or debts owing to the testator, to be paid to the same persons and in the manner directed with respect to the income of the estate when invested. The testator gave the produce of his real and personal estate to his two daughters for their lives, with remainder over; and he recommended each of his two daughters to pay 25*l.* a year out of her moiety of the income of his estate for the education and maintenance of his nephew, until the nephew attained twenty-one years:—*Held*, that (there being no improper delay in the conversion of the estate) the daughters of the testator, as tenants for life, were entitled to the income actually produced by the residuary estate during the interval before the sale or realisation of the whole of such estate, and the investment thereof according to the directions in the will; but that they were not entitled, during that interval, to any interest

upon such parts of the residuary property, or on the value of such parts thereof as were unproductive. *Mackie v. Mackie*, 70

2. That the two sums of 25*l.* were only to be allowed by the daughters to the nephew yearly out of their income during their lives, and that such sums did not constitute a charge upon the life interests of the daughters for the whole period of the minority of the nephew. *Id.*

TENANT FOR LIFE OF AN ESTATE SUBJECT TO A DEMISE FOR 200 YEARS.

See PARTIES, 2.

TIMBER ESTATE.

See VENDOR AND PURCHASER, 7.

TITHES.

1. An act for making a railway enabled the company to pull down the houses of a parish in the city, and provided for the indemnity of the rector in respect to his right to the tithes of 2*s.* 9*d.* in the pound on the removed buildings, by enacting that the company should pay the rector tithes in respect of the houses removed according to the last assessment thereof to Lady-day preceding, equal to the loss sustained by the want of occupiers owing to such removal, until new houses or other buildings should be erected of such annual value that the tithes payable thereon should be equal to the tithes payable on the buildings removed, such payments to diminish in proportion to the yearly sums actually payable for tithes on the new buildings. The company pulled down houses, on some of which the tithes of 2*s.* 9*d.* in the pound were paid on the full annual value,—on others, of which the same had been paid by

agreement between the rector and the occupier, at less than the full annual value—and several on which the tithes had been wholly or partly remitted by the rector for the sake of harmony:—*Held*, that the rector was not, under the railway act, entitled to tithes from the company according to the value at which the property removed was assessed to the poor-rate. *Letts v. The London and Blackwall Railway Company*, 605

2. That the rector was entitled to tithes from the company according to the annual value at which the property removed had been last fixed by agreement between the rector and the occupier. *Ib.*

3. That where no agreement was proved to have been made between the rector and occupier, the sum last collected as tithes should be taken as representing 2s. 9d. in the pound on the annual value of the buildings. *Ib.*

TITLE.

See DEMURRER, 2.

TIME.

See JOINT-STOCK COMPANY, 10.
VENDOR AND PURCHASER, 4.

TIME OF MAKING CONTRACT.

See MORTGAGOR AND MORTGAGEE, 9.

TITLE OF ANSWER.

See ANSWER, 2.

TRANSFER OF SHARES.

See JOINT-STOCK COMPANY, 3.

TRUSTEE.

See COVENANT, 4, 5.

TRUSTEE AND CESTUI QUE TRUST.

See ADMISSION AND DISCHARGE, 1, 4, 5.

ANSWER, 3.

CHARITY.

COPYHOLD.

FORFEITURE.

HERITABLE BOND.

INVESTMENT.

JOINT STOCK COMPANY, 1, 2, 7.

PARTIES, 1, 3.

RECTIFYING SETTLEMENT.

1. In a suit to appoint new trustees of a settlement, where a part of the trust property had been lost by previous negligence or breach of trust, the Court refused to confine the trust to the remaining property, but appointed the new trustees to be trustees of the whole of the property comprised in the settlement, directing (for the protection of the new trustees) a reference to inquire whether it would be proper to take proceedings for the recovery of the property which had been lost. *Bennett v. Burgis*, 295

2. An executor having possessed a promissory note for 400*l.* part of the assets of the testator, retained the note in his possession, without taking any proceedings to recover the amount or the interest for seven years; and at the end of seven years, when the sole residuary legatee came of age, the executor delivered the note to the residuary legatee. The residuary legatee ten years afterwards filed his bill against the executor, charging him with breaches of trust in the administration of the estate. The Court, in such circumstances, refused to charge the executor with the amount of the promissory note, or direct an inquiry whether any loss had resulted to the estate by reason of the executor not having taken proceedings to enforce

payment of the amount due on the note. *East v. East*, 348

3. In such a case the executor would not be chargeable, unless it should be found that the amount of the note could have been recovered during the seven years between the death of the testator and the time when Plaintiff attained his majority; and if it were found that the amount could have been recovered during that time, still the executor would not be chargeable unless it should be found that the amount could not have been recovered during the ten years which elapsed after the note had been delivered to the Plaintiff. *East v. East*, 349

TRUSTEE OUT OF THE JURISDICTION.

See STAT. 1 W. 4, c. 60.

UNITARIAN CONGREGATIONS.

A bequest for the assistance of Unitarian congregations held to be valid, and the trust directed to be carried into execution. *Shrewsbury v. Hornby*, 406

VALUATION OF BUILDINGS.

See TITHES.

VOLUNTARY BOND.

See ADMINISTRATION SUIT, 2.

VENDOR AND PURCHASER.

See COMMON LANDS.

DEMURRER, 2.

MINING SHARES.

SPECIFIC PERFORMANCE.

1. The purchaser of a real estate became insolvent after part, but before

the whole, of the purchase-money was paid, or the conveyance executed. The vendor died, having devised the estate to the Plaintiffs, and appointed one of them his executor. The bill was filed against the provisional assignee of the insolvent, and an equitable mortgagee by deposit of the agreement for purchase; and it prayed the payment of the residue of the purchase-money by the Defendants, or by sale of the estate. The Plaintiffs did not prove their title as devisees. The Defendants disclaimed:—*Held*, that the Court could not make the decree sought without evidence of the devise; but that, upon payment of the costs of the Defendants, the Court might (the Defendants not opposing) declare the Plaintiffs absolutely entitled to the estate. *Gabriel v. Sturgis*, 97

2. Reference as to title directed on motion after answer to a bill for specific performance by the vendor against the purchaser, notwithstanding the purchaser stated that his requisitions on the abstract had not been complied with, although the time for completion of the contract had long expired, and he had given notice of his intention to rescind the contract. *Wood v. Machu*, 158

3. Objections to title mean such objections as can only be properly the subject of adjudication upon the investigation of the title; and such are cases where the dispute is as to the application of the conditions of sale, the propriety or validity of the conditions themselves not being questioned. *Ib.*

4. The purchaser cannot, owing merely to the delay of the vendor in complying with his requisitions, determine the contract without notice, or bring an action for his deposit before the termination of his notice, where time was not originally of the essence of the contract. Whether he can do so after the expiration of notice, where

time has not been made of the essence of the contract, or, being of the essence of the contract, has been waived, depends upon the conduct of the vendor after notice. *Ib.*

5. Reference of title, upon motion by the Plaintiff (the vendor) after answer, notwithstanding the question in dispute in the cause might have been conveniently determined by the Court, at the hearing, without a reference. *Curling v. Flight*, 248

6. Whether the question in a cause be, what evidence of title the vendor is bound to give; or whether he is able to give sufficient evidence,—the question is equally one of title, and the proper subject of a reference. *Ib.*

7. Bill by the vendor for the specific performance of a contract to purchase a timber estate, where the particulars of sale described it as comprising a certain wood "with upwards of sixty-five acres of fine oak timber trees, the average size of which approached fifty feet," and in the particulars of the lot described it only as "sixty-five acres two roods and twelve perches of growing timber." It appeared, on the evidence for the Plaintiff, that the average size of the trees was about thirty-five feet, but on that for the Defendant that it was only about twenty-two feet; and the Defendant moreover alleged that it was sold at a time when he had no means of seeing the wood, and that he relied on the particulars of sale:—*Held*, that, as the representation of the particulars of sale had proved to be incorrect, and as it was not shewn that the Defendant knew it to be incorrect at the time of making the contract, the Court would not, at all events,

enforce the specific performance of the contract without compensation; and that (inasmuch as the particulars of sale did not express what number of trees or quantity of timber the wood contained) it was not a case in which the Court could measure the extent of the deficiency, or ascertain the amount of compensation; and that the bill must therefore be dismissed. *Lord Brooke v. Rounthwaite*, 298

VERDICT AT LAW.

See INJUNCTION, 2.

SPECIFIC PERFORMANCE.

VESTED INTEREST.

See CONSTRUCTION, 3.

WATER COURSE.

See ACT OF PARLIAMENT, 1.

WIDOW.

See ELECTION.

WILL.

See CHARITABLE USE.

ELECTION.

LEGACY.

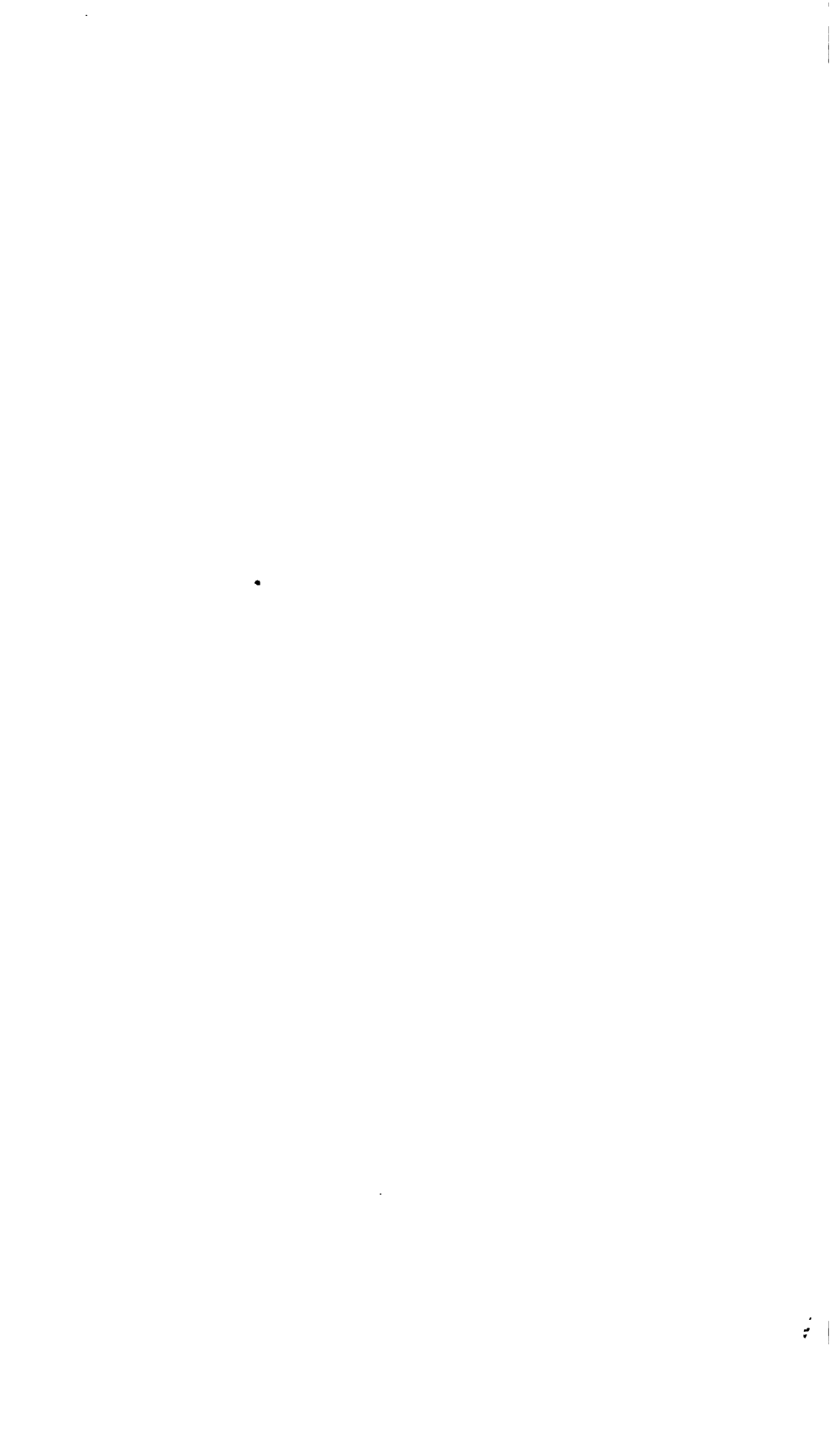
RE MOTENESS.

REVOCATION.

STATUTE OF WILLS (7 WILL. 4 & 1 VICT. c. 26).

WRITING.

See STATUTE OF WILLS (7 WILL. 4 & 1 VICT. c. 26).



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